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WE are pleased to see our views, as outlined in a recent issue, upon the duties of a constitutional convention, indorsed by so eminent an authority as Judge Cooley. The latter, in addressing the convention at Bismarck, gave the constitution builders some excellent advice, and said, among other things: "Don't in your constitution making, legislate too much. In your constitution you are tying the hands of the people. Don't do that to any such extent as to prevent the legislature hereafter from meeting all evils that may be within the reach of proper legislation. Leave something for them; take care to put proper restraints on them, but at the same time leave what properly belongs to the field of legislation to the legislature of the future. You have got to trust to some one in the future, and it is right and proper that each department of the government should be trusted to perform its legitimate functions."

There can be no question as to the wisdom of these words, and if they are unheeded by the conventions now in session, the new States will, at their birth, find themselves shackled and manacled in a manner inconsistent with free and progressive Statehood.

THE legislature of Texas has recently passed an act, in reference to foreign corporations, which it would be well for the latter to take note of, and which will create some consternation in the ranks of those heretofore doing business in that State. The act provides that all corporations of other States must obtain a license to do business in Texas, and makes it necessary to secure the same, in order to do business or solicit orders there. This license is obtained by filing with the secretary of State a certified copy of articles of incorporation, and paying a fee, varying according to the amount of the capital stock. The penalty, for noncompliance with the provisions of this law, is inability to enforce any demands in the State courts of Texas.

THE judicial and administrative opinions which have thus far been rendered, upon the act of congress, prohibiting the importation of foreigners and aliens, under contract, to perform labor in the United States, indicate that its provisions are more stringent than has been generally understood. It will be remembered that a little over a year ago, Judge Wallace, of the United States circuit court, held the authorities of a New York church liable for the penalty imposed by the act for bringing over an English minister to become the pastor of the church. In that case the rule was laid down that contracts to perform professional services, except those of actors, artists, lecturers or singers are within the prohibition of the law. In an opinion lately rendered by the solicitor of the treasury the law is interpreted as prohibiting the bringing over, under contract, of aliens, as teachers and professors in a university. Such teachers, the solicitor holds, cannot be regarded as "lecturers" within the meaning of the exception in the act, even though they may instruct by means of lectures.

A RECENT Connecticut case is attracting attention and exciting considerable interest in that staid old commonwealth. It is nothing more nor less than a suit by a householder against a neighbor for damages alleged to have resulted from said neighbor placing fly screens in his windows and thereby causing a greater number of flies to enter and invade plaintiff's house. The claim made seems to be that, under the common law, every family is bound to provide for its quota of flies, and that defendant, by the use of screens, fails to make provision for his proper allowance, and by driving them elsewhere, raises the *pro rata* of the community and especially of plaintiff, whose house adjoins that of defendant. It is, we conceive, something new in jurisprudence, and its outcome will, no doubt, interest the members of the legal profession. The plan of defense which will be made by defendant has not yet been outlined. It is stated that under the wise provisions of the Connecticut law, the defendant will not be allowed to deny that it is his duty to provide for his share of the village flies, but it is understood

that he will attempt to throw the burden of proof on the plaintiff by alleging that no members of his apportionment of flies can be found in plaintiff's house, they having, when barred out from their rightful buzzing place, adjourned in a body to a beer garden in close proximity. This defense, and the unavoidable rebuttal will, of course, render necessary the identification of the flies in open court, both those found in the plaintiff's house, as well as those at the beer garden. Should the proprietor of the latter refuse to produce his flies, or should he secure their release by writ of *habeas corpus*, it will greatly complicate matters and add interesting features.

NOTES OF RECENT DECISIONS.

A DECISION of much importance in the law of corporations, is that of United States Supreme Court in Morgan v. Struthers. There an agreement by the incorporators of a company to take the shares of one of the subscribers, and refund his money if he should demand it within a fixed time, was held valid, though none of the subscriptions were to be paid in until all the stock was all reliably subscribed, and the other subscribers neither made such an agreement as to their stock, nor were aware that the one in question was made, there being no design to deceive or defraud any one. Lamar, J., says:

Counsel for defendant urges that notwithstanding this right to make an absolute sale of his stock belongs to each subscriber, the policy of the law forbids one of them, whose act of subscription may be held out as an inducement for others to subscribe, from making a contract of future sale with a view to secure his investment; and renders such a contract void, because many co-stockholders "may have been chiefly induced to subscribe by a knowledge that so prominent and successful an operator was willing to risk his money in such an adventure; and who, had they been told that he had exacted a private security or guarantee which availed to give him the benefit of both the experiment in business and of getting back his money with interest if it did not succeed, would assuredly either have refused to subscribe, or demanded a similar guarantee. Moreover, they had a right to suppose that the new firm was to have the countenance of Mr. Morgan, and probably his assistance in the future." This is a palpable misconception of the nature of the transaction. There was nothing in the prospectus, or in the subscription contract, or in the nature of the enterprise, to justify such a presumption or expectation on the part of the other stock subscribers. It is just in this spect, especially, that an incorporated joint stock company differs from an ordinary copartnership. In the latter, the individual members of the firm are presumed to, and in general actually do, contribute to the common enterprise, not only their several shares of partnership capital, but also their individual experience, skill, or credit, no member having the right to sell out his interest or to retire from the firm without the consent of the copartners; and if he does either, the act amounts to a dissolution of the partnership: Principles of Partnership, Parsons, § 171. The very reverse, as we have said, is the case of a joint stock corporation, in which each stockholder, whether by purchase or original subscription, has the right, unless restrained by the charter or articles of association, to sell and transfer his shares, and, by transferring them, introduce others in their stead. It is also urged that "the other subscribers had a right to presume that Mr. Morgan went into the common enterprise upon the same terms with themselves." This proposition is true so far as those terms are prescribed in the charter, the prospectus, and the contract of subscription; but it is also true that each of those stockholders had the equal right to sell, or agree to sell, that stock whenever and to whomsoever he chose, such stock being personal property and subject to any disposal he might choose to make of it; and that this right belonged none the less to Morgan, on account of his prominence and known skill as an operator, than it did to any other member of the corporation. We have read with care all the authorities cited by counsel for defendant in error to support the claim that the contract in question is, in the eye of the law, fraudulent and void. Those which relate to contracts connected with subscriptions of stock, are simply illustrative, in different forms, of a doctrine well settled in a great number and variety of decisions, that a corporation has no legal capacity to release an original subscriber to its capital stock from payment of it, in whole or in any part; and that any arrangement with him by which the company, its creditors or stockholders, shall lose any part of that subscription, is *ultra vires* and a fraud upon creditors and co-subscribers: Burke v. Smith, 16 Wall. 390, 395; Bedford v. Bowser, 48 Pa. St. 29; Green's Brice's *Ultra Vires*. This doctrine rests upon the principle that the stock subscribed, both paid and unpaid, is the capital of the company, and its means of carrying out the object for which it was chartered and organized. All these cases fall within this principle. In each of them the agreement declared void, had it been carried out, would have diminished the common fund, which is a trust fund for the benefit of the general creditors of the corporation, the stockholders, and all others having an interest therein, and would have been violative of the terms upon which the subscriptions had been expressly made, and under which the trust originated. The corporation would have been damaged in its capital by the loss of the subscriptions, and the co-subscribers would have been damaged by the lessening of their common trust fund. As we have seen, no feature of damage to the corporation, actual fraud or violation of contract, exists in this case. The contract sued on, if specifically carried out, would have simply resulted in what all agree lay within the power of each subscriber at the time of making his subscription—a transfer of his stock and the introduction of other stockholders in his stead. Counsel for defendant has cited cases of composition between an insolvent debtor and his creditors, where one creditor has secured, by a secret arrangement either with the insolvent or some other person, terms more favorable to himself than the composition agreement provided for all of the other

creditors joining therein. In the English cases the definite doctrine is carried to the fullest extent, that such secret arrangements are utterly void, even as against the party with whom the arrangement was made. The American decisions, whilst perhaps not going to the extent of the English decisions, clearly assert the illegality of such arrangement: 1 Story Equity Jurisprudence, §§ 378, 379; White v. Kuntz, 107 N. Y. 518. But we think that the analogy between the cases of composition agreements and those of stock subscriptions is remote, and that the decisions as to the former are not applicable to this case. The relations of composition creditors either to the insolvent's estate or to each other, are widely different from those which stock subscribers bear to the corporation and their co-subscribers. Upon the failure or insolvency of a debtor his creditors stand together in a common relation of claims, proportionate to their amount and grade, upon an interest in his (the insolvent's) estate. "The purport," says Mr. Justice Story, "of a composition or trust deed, in cases of insolvency, usually is, that the property of the debtor shall be assigned to trustees, and shall be collected and distributed by them among the creditors, according to the order and terms prescribed in the deed itself. And, in consideration of the assignment, the creditors, who become parties, generally agree to release all their debts beyond what the funds will satisfy." 1 Story Equity Jurisprudence, § 378. It is clear that any secret bargain by which one of these creditors obtains more than the composition deed gives, and more than he agrees under it to take, violates the equality which is the basis of the deed of settlement, and operates a gross fraud upon the creditors—a fraud which the law, in its policy of precaution rather than by mere remedial justice, suppresses by depriving the parties of the fruit of their clandestine arrangements.

AN interesting question of partnership came before the Supreme Court of Indiana in Purple v. Farrington. There it was held that members of an insolvent partnership may mortgage the firm property to secure the individual indebtedness of one of the partners, if in so doing they act in good faith. The court says:

The central question presented by the record is whether or not the members of a partnership, largely indebted and insolvent, may mortgage the firm property to secure an individual indebtedness, if in so doing they act in good faith. The answer to the cross-complaint does not charge a fraudulent intent, and in the verdict of the jury it expressly found that in the execution of the mortgage in question there was no fraudulent intent to hinder or delay firm creditors in the collection of their debts. The statutory provision to which we have called attention is of itself sufficient to control the decision of the question involved. The question of fraudulent intent being a question of fact, and not of law, its determination will depend upon what shall be decided by the tribunal to which it is submitted, after the evidence is introduced and considered, and if, after due consideration, the decision is in favor of the *bona fides* of the transaction, then it must be upheld. But the question is not barren of authority. We quote from the opinion of the court delivered by Mitchell, J., in the case of Lanier v. Wallace, 17 N. E. Rep. 926: "It is settled everywhere that, when the assets of a partnership or the individual property of the members of a firm are brought under the jurisdiction of a court for judicial administration, the equitable rule of distribution will be applied, and the partnership assets will be devoted, first, to the payment of the firm debts, and the individual property of the several partners to their individual debts, respectively. But, where the partnership assets remain under the control of the partners, they have the power to appropriate any portion of it to pay or secure the individual debts of the members of the firm. Thus in Fisher v. Syfers, 109 Ind. 514, 10 N. E. Rep. 306, this court said: 'Where debts are fairly owing by either partner individually, the mere preference of individual over partnership creditors by the execution of a chattel mortgage in the firm name, or by authority of the partners, upon the property of the firm, is not of itself such a fraud upon the partnership creditors as will authorize the setting aside of the chattel mortgage at the suit of the creditor.' Bank v. Sprague, 20 N. J. Eq. 13; Kirby v. Schoonmaker, 3 Barb. Ch. 46; Kennedy v. Bank, 23 Hun, 494; Jones, Chat. Mort. § 44; *In re* Kahley, 2 Biss. 383. So, in the same decision, it is said: 'The rule that obtains in the distribution of the estates of partners, and under which partnership creditors are entitled to priority of payment out of the partnership assets, is an equitable doctrine, for the benefit and protection of the partners respectively. Partnership creditors have no lien upon partnership property. Their right to priority of payment out of the firm assets over the individual creditors is always worked out through the liens of the partners.' Warren v. Farmer, 100 Ind. 503; Trentman v. Swartzell, 85 Ind. 443. Upon the death of one partner, or where the firm becomes bankrupt, or where the partnership assets are being administered by a court, the rule of equitable distribution is applicable to its fullest extent. Where, however, the partners have the possession and control of their own property, they have the right to make any honest disposition of it if they see fit. Each has the right to waive his equitable lien, and together they may sell, assign, or mortgage the property of the firm to pay or secure either an individual debt of one of the partners or the debts of the firm. The equity of the creditors is a derivative one, and arises out of the principles of subrogation, entitling them to enforce the equities subsisting between the partners so long as the right of any of the partners has not been waived. But the partners may waive their rights, either in the partnership property or that owned by them individually. Dunham v. Hanna, 18 Ind. 270; Case v. Beauregard, 99 U. S. 119, and cases cited." We take the following from the opinion of this court, delivered by Olds, J., in the case of Goudy v. Werbe, 19 N. E. Rep. 769: "The true doctrine is that the property of the partners is their joint property, and they may sell and dispose of the same in good faith, as they deem proper; and as held in the case of Fisher v. Syfers, *supra*, they have the right to prefer creditors, and even may, if all the partners consent to do so, dispose of the property to satisfy the individual debt of one of the partners, which would operate to decrease the assets of the firm and to the detriment of the firm creditors, yet, nevertheless, they have such right to secure or pay the *bona fide* debt of one of the partners." These cases are decisive of the question under consideration, but we cite the following authorities as bearing upon the question: Louden v. Ball, 93 Ind. 232; McFadden v. Fritz, 90 Ind. 590; McFadden v. Hopkins, 81 Ind. 459; Morris v. Stern, 80 Ind. 227; Schaeffer v. Fithian, 17 Ind. 463; Kistner v. Sindlinger, 33 Ind. 117.

THE question as to the liability of a municipal corporation for injuries suffered by a prisoner in jail, caused by its defective condition, came before the Supreme Court of North Carolina in Moffit v. City of Asheville. There it was held that where a city authorized by law to build a city prison has built a reasonably comfortable one, and furnished to the officers in charge thereof the supplies required by law, it is not liable to a prisoner for neglect of the jailer or attendants to keep fires or furnish him with necessary bedclothing, whereby the prisoner is injured, where the city has no notice of such neglect, and is not negligent in overseeing the prison. The court says:

The liability of cities and towns for the negligence of their officers or agents depends upon the nature of the power that the corporation is exercising when the damage complained of is sustained. A town acts in the dual capacities of an *imperium in imperio*, exercising governmental duties, and of a private corporation enjoying powers and privileges conferred for its own benefit. When such municipal corporations are acting (within the purview of their authority) in their ministerial or corporate character in the management of property for their own profit, or in the exercise of powers assumed voluntarily for their own advantage, they are impliedly liable for damage caused by the negligence of officers or agents subject to their control, although they may be engaged in some work that will inure to the general benefit of the citizens of the municipality. Shear. & R. Neg. §§ 125, 126; 2 Dill. Mun. Corp. §§ 966, 968; 3 Thomp. Neg. 734; Meares v. Wilmington, 9 Ired. 73; Wright v. City of Wilmington, 92 N. C. 156; Whart. Neg. § 190; 10 Meyers, Fed. Dec. § 2327. The grading of streets, the cleansing of sewers, and keeping in safe condition wharves, from which the corporations derives a profit, are corporate duties. Whit. Smith Neg. 122; Barnes v. District of Columbia, 91 U. S. 540-557; Weightman v. Washington, 1 Black, 39; Whart. Neg. § 262; On the other hand, when a city or town is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute (expressly or by necessary implication) subjects the corporation to pecuniary responsibility for such negligence. Hill v. Charlotte, 72 N. C. 55; State v. Hall, 97 N. C. 474; 2 Dill. Mun. Corp. §§ 965, 975; Dargan v. Mayor, 31 Ala. 469; City of Richmond v. Long, 17 Grat. 375; Stewart v. New Orleans, 9 La. Ann. 461; Whart. Neg. §§ 191, 260; Hill v. City of Boston, 122 Mass. 344; Shear. & R. Neg. § 129. * * * The aldermen of Asheville were vested with authority to erect a city prison by section 47, ch. 111, Priv. Laws 1883, if they did not have the power by implication under the general law in reference to towns; and when they built the police guard house in the exercise of their power the city became as fully amenable for its proper structure and superintendence, as the general assembly was required by the constitution to make it answerable by competent legislation. The defendant, in the discharge of its judicial duties, could not have incurred any liability in any view of the case, but for the express provisions of the constitution and laws. 2 Dill. Mun. Corp. § 975 (773); Hill v. Charlotte, *supra*. By a well known rule, therefore, the law imposing this responsibility on such municipal corporations for the proper structure and superintendence of their prisons must be construed strictly. We hold that the defendant is liable in damages only for a failure either to so construct its prison, or so provide it with fuel, bedclothing, heating apparatus, attendance, and other things necessary, as to secure to the prisoners committed to it a reasonable degree of comfort, and protect them from such actual bodily suffering as would injure their health. If the aldermen of the city built a reasonably comfortable police prison, and afterwards furnished to those who had immediate charge of it everything that was essential to prevent bodily suffering on the part of prisoners from excessive cold, or heat, or hunger, and to protect their health, the city would not be liable, even if the suffering or sickness of the plaintiff was caused by neglect of the jailer, the policemen, or the attendants, to keep the fires burning all night, or to give the plaintiff the necessary bedclothing furnished to them. Shear. & R. Neg. § 139, and note 2. The word "superintendence" means oversight or inspection, and was intended, as used in the constitution, to impose upon the governing officials of a municipal corporation the duty of exercising ordinary care in procuring articles essential for the health and comfort of prisoners, and of overlooking their subordinates in immediate control of the prisons (so far at least as to replenish the supply of such necessary articles when notified that they are needed), and of employing such agents, and raising and appropriating such amounts of money, as may be necessary to keep the prison in such condition as to secure the comfort and health of the inmates. Threadgill v. Commissioners, 99 N. C. 352.

WHETHER in a prosecution for a felony, the right to a jury trial can be waived was decided in the negative by the Supreme Court of Illinois in Harris v. People. It was held that under Const. Ill., art. 2, § 5, which provides that the right of trial by jury, as heretofore enjoyed, shall remain inviolate, and Rev. Stat. Ill., ch. 38, div. 13, § 11, which provides that juries in all criminal cases shall be the judges of the law and of the fact, a defendant who has pleaded not guilty cannot, even by consent, be tried for felony by the judge without a jury. The court says:

There can be no question that, at common law, the only recognized tribunal for the trial of the guilt of the accused under an indictment for felony and a plea of not guilty was a jury of twelve men. 4 Bl. Comm. 349; 1 Chit. Crim. Law, 505; 2 Hale, P. C. 161; 5 Bac. Abr. tit. "Juries," A; 2 Benn. & H. Lead. Crim. Cas. 327. This right of trial by jury in all capital cases—and at common law a century and a half ago all felonies were capital, was justly regarded as the great safeguard of personal liberty. Says Blackstone: "The founders of the English law have, with excellent forecast, contrived that no man should be called to answer the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury; and that the truth of every accusation, whether preferred in the shape of indictment, infor-

mation, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion." 4 Bl. Comm. 349. The trial of an indictment for a felony by a judge without a jury was a proceeding wholly unknown to the common law. The fundamental principle of the system in its relation to such trials was that all questions of fact should be determined by the jury, questions of law only being reserved for the court. Not only have we, in general terms, adopted the common law as a system, but by the express provisions of our constitution and statutes the mode of trial in criminal cases known to that system is specifically adopted and preserved. By the clauses of the constitution above cited, the common law right to a trial by jury in criminal cases is guaranteed and declared to be inviolable, and the statute requires that, except as therein provided, all trials for criminal offenses shall be conducted according to the course of the common law. It would thus seem that the power to conduct criminal trials in any other mode than that which prevailed at common law is necessarily excluded. A jury of twelve men being the only legally constituted tribunal for the trial of an indictment for a felony, it necessarily follows that the court or judge is not such tribunal, and that, in the absence of a jury, he has by law no jurisdiction. There is no law which authorizes him to sit as a substitute for a jury, and perform their functions in such cases, and, if he attempts to do so, his act must be regarded as nugatory. Especially must this be true where the jury are not only the judges of the facts as at common law, but are also the judges of the law as provided by our statute. But it is said that the right to a trial by a jury is a right which the defendant may waive. This may be admitted, since every plea of guilty is, in legal effect, a waiver of the right to a trial by the legally constituted tribunal. But while a defendant may waive his right to a jury trial, he cannot by such waiver confer jurisdiction to try him upon a tribunal which has no such jurisdiction by law. Jurisdiction of the subject-matter must always be derived from the law, and not from the consent of the parties, but in the present case jurisdiction is sought to be based, not upon any law conferring it, but upon the defendant's consent and agreement to waive a jury, and submit her cause to the court for trial. "It is a maxim in the law that consent can never confer jurisdiction, by which is meant that the consent of parties cannot empower a court to act upon subjects which are not submitted to its determination and judgment by the law. The law creates courts, and, upon consideration of general public policy, defines and limits their jurisdiction, and this can neither be enlarged nor restricted by the act of the parties." Cooley, Const. Lim. 398. It is said, however, that the constitutions and statutes confer upon the criminal court of Cook county general jurisdiction of all criminal cases arising in Cook county. That is true, but the court, when properly constituted for the trial of criminal cases, and especially for the trial of felonies, consists not merely of a judge, but also of a clerk, a sheriff, a State's attorney, and a jury. For the trial of felonies, the judge alone is not the court. The judicial functions brought into exercise in such trials are parceled out between him and the jury, and, so long as there is no law authorizing it, the functions to be exercised by the jury might just as well be transferred, by agreement of the parties, to the clerk or sheriff as to the judge. The views we have expressed are fully supported by the authorities: See State v. Lockwood, 43 Wis. 403; Williams v. State, 12 Ohio St. 622; Cancemi v. People, 18 N. Y. 128; State v. Wansfield, 41 Mo. 470; State v. Davis, 66 Mo. 684; Allen v. State, 54 Ind. 461; Hill v. People, 16 Mich. 351.

THE question of the liability of banks in the collection of commercial paper was considered by the Supreme Court of Colorado, in German National Bank v. Burns. Plaintiff made a deposit in a Leadville bank, and received a certificate of deposit, which he indorsed and sent to defendant bank, where he had an account, with instructions to credit his account with the same. Defendant acknowledged receipt, and deposited a letter in the post-office at Denver containing the certificate, duly addressed to the Leadville bank, and stating that the inclosure was for "collection and credit." Not receiving a response in due course of mail, defendant sent inquiry by telegram, and received answer: "No such remittance received." Whereupon defendant reported the same to plaintiff by letter, directing him to go to the Leadville bank and get a duplicate certificate, which letter was not received by plaintiff until after the Leadville bank had failed. It was held that defendant was liable to plaintiff for the amount of the deposit. The court says:

Some courts have held that a bank undertaking the collection of commercial paper is responsible, not only for any loss occasioned by the negligence of its own immediate servants and agents, but also for the neglect or default of any intermediate agent or correspondent to whom it intrusts such paper for collection in the regular course of business; and that this responsibility continues notwithstanding the collecting bank has exercised all reasonable care and diligence in the selection of such intermediate agents. Other decisions are to the effect that this responsibility extends only to collections to be made in the same place where the collecting bank is located, and that in case of a collection at a distant point the bank discharges its duty by sending the paper in due season to a competent and reliable agent, with proper instructions. Again, a distinction is made between an undertaking to collect commercial paper and an undertaking to transmit the same for collection. In the former case the undertaking extends through the whole course of proceedings, and includes all the steps necessary or incidental to the accomplishment of the object to be performed, and the collecting bank is held to answer for every neglect or default in the performance of its contract whereby its customer suffers loss, whether the negligence be that of its own immediate officers or agents or any subagent of its own selection; in the latter case the undertaking is to use all reasonable diligence in the selection of the agent to whom the paper is thus transmitted. 1 Daniel, Neg. Inst. § 341 *et seq.*; Bank v. Bank, 112 U. S. 276, 5 S. C. Rep. 141. Counsel, with much research and learning, have discussed at length these apparently conflicting decisions, and yet we do not find it necessary in the determination of this case to attempt to harmonize, distinguish, or select from

among them with the view to declare the rule in this State in respect thereto. In this case defendant sent the certificate of deposit by mail direct to the maker thereof—to the bank issuing the same. Whether the letter of transmittal is to be regarded as an instruction to credit defendant with the amount of the certificate at the Leadville bank, or to remit to defendant the amount thereof, the risk was the same. Literally, the three letters above given, and the telegraphic reply by the Leadville bank above quoted, would seem to indicate that the forwarding of the certificate might have been intended as a "remittance" by defendant for "credit" on its own account at the Leadville bank, instead of a request to pay and return the proceeds. If such was the intent of defendant by the course pursued it would have been unconditionally liable to plaintiff if the certificate was received by the Leadville bank before its suspension. Morse, Bank. 364; Taber v. Perrot, 2 Gall. 565. But we need not rely upon this construction of the correspondence; for, whether we regard the sending of the certificate to the Leadville bank as the selection of such bank as agent for the collection of the paper, or as a direct presentation of the paper for payment, as defendant's counsel contend, the danger of such course was the same in either case. Even if we can conceive of such an anomaly as one bank acting as the agent of another to make a collection against itself, it must be apparent that the selection of such an agent is not sanctioned by business like prudence and discretion. How can the debtor be the proper agent of the creditor in the very matter of collecting the debt? His interests are all adverse to those of his principal. If the debtor is embarrassed, there is the temptation to delay; if wanting in integrity, there is the opportunity to destroy and deny the evidence of the indebtedness. The fact that the Leadville bank was a correspondent of the defendant to a limited extent does not alter the rule. Suppose an attorney receiving a promissory note for collection, executed by another attorney resident in a distant city, should send such note direct to the maker, asking him to undertake the collection thereof, and that in consequence of such course the collection should be lost, would it be any legal answer to his client for the first attorney to claim that the second attorney was his correspondent, to whom he had frequently sent collections, and that he was an attorney of good reputation and standing, financially and otherwise? As a matter of law such method of doing business cannot be upheld. It violates every rule of diligence. Even if we were to follow the rule that the collecting bank could relieve itself from liability by sending the paper in due season to a suitable agent, with proper instructions, we feel constrained to hold in the language of Mr. Justice Allison of the court of common pleas of Philadelphia, concurred in by the Supreme Courts of Pennsylvania and of Illinois, "that such suitable agent must, from the nature of the case, be some one other than the party who is to make the payment." Bank v. Goodman, 109 Pa. St. 428, 2 Atl. Rep. 687; Bank v. Provision Co., 117 Ill. 100, 7 N. E. Rep. 601. Counsel for appellant cite two cases as bearing directly upon the question under consideration—People v. Bank, 78 N. Y. 269, and Indig v. Bank, 80 N. Y. 100. Upon a careful examination it will be found that in neither case was the bank to which the paper was sent the maker of such paper, nor primarily liable thereon. In each case the party to make the payment was a customer or depositor merely of the bank to which the paper was sent. Again, the sending of the certificate by mail direct to the Leadville bank for payment is not equivalent to a direct presentation thereof at the counter by a party not identified in interest with the bank itself. In presenting a check or certificate of deposit at the counter in legal contemplation the holder does not give up the paper except as he then and there receives payment in hand. The surrender of the paper and the receipt of payment are regarded in law as simultaneous. Would it be considered diligent or prudent for an agent undertaking to collect negotiable paper to leave the paper at the counter with the president or cashier of the bank primarily liable to pay the same, and go away without receiving payment, merely directing a remittance of payment by mail or otherwise? We think not; and yet the opportunity for successfully evading or delaying payment in such a case would not be as great as in sending the paper direct to the bank by mail, expecting remittance by mail.

THE SITUS OF INSURED PROPERTY.

1. *Removal of Property from the Place Designated for the Purpose of Using it.*—One difficulty in investigating the question stated is met with in the fact that very few of the reported cases disclose whether or not written applications were made for the policies sued upon, and if they were made whether they contained representations or warranties concerning the situation of the property. If a warranty is made that the property is contained in a designated place or building, it would seem that it would follow from the nature of the fire insurance contract that it is a continuing warrranty. A warranty *in præsenti* is usual to the contract of life insurance, is indispensable to it, but in fire insurance it is co-existent with the term of the policy, unless it is terminated by the contingency provided for. If the terms of the application are not explicit it will not be held to constitute a warranty.[1] But if they are clear the insured will be held strictly to them. A written application was for, and the policy insured merchandise "contained in letter C" of certain described stores. At the time the policy issued and when the loss occurred the property was in letter A of the stores described, which was a warehouse, divided, for the purpose of safety from fire, into sections, by solid walls with no communication between; each section was designated by a letter. The court said that the description of the place of deposit of the property, written into the policy in accordance with the application of the insured, was a warranty

[1] National Bank v. Hartford F. Ins. Co., 95 U. S. 673; Moulor v. American L. Ins. Co., 111 *Id.* 335; Accident Ins. Co. v. Crandal, 120 *Id.* 527.

by him of its particular location, the truth of which became a condition precedent to any liability to him from the defendant. And it was a warranty and a condition precedent not to be avoided by the fact that the truth of the description was not essential to the risk, nor an inducement to the defendant to enter into the contract.[2]

It is an implied condition of marine policies upon cargo that the goods will be stored in the usual and customary place for goods of their class. Any breach of this condition which varies the risk, and increases the perils insured against, avoids the policy.[3] If the policy does not clearly express the intent of the parties to it, its words are taken most strongly against the insurer, it having been drawn by him.[4] In construing the contract the nature of the property will be considered in arriving at the intent of the parties. An article of wearing apparel was described by the policy as "contained in" a designated dwelling-house; and that instrument provided that, if the risk was increased by any means, without the insurer's assent, it should become void. The article was sent to a suitable place to be repaired, and before the repairs could be made in the usual course of business, it was burned. The risk was greater at the place to which it was sent, than in the dwelling. The insurer was held liable. The court say: In a policy upon personal property, which, from its character and ordinary use, is kept continually in one place, as a stock of merchandise, machinery in a building, household furniture, or goods stored, the rule undoubtedly is that the location of the property designated in the policy is an essential element of the risk, and usually a continuing warranty. In such a case the policy covers the goods only so long as they remain in the designated place, and if they are destroyed elsewhere, the insurer is not liable for the loss. But this rule does not apply where the insured property is of such a character that its temporary removal or absence from the specified place is necessarily incident to its use and enjoyment, and such may be presumed to have been in contemplation of the parties when they made the contract.[5]

The first proposition stated in the Wisconsin case is undoubtedly correct. A policy insuring a stock of goods described it as "contained in" a designated building. The court observes that the quoted words limit the risk to the time the property remained in the building designated, and constitute a restriction upon the risk and make it continue only so long as the goods remain therein.[6] In an earlier case the same rule was applied to a locomotive engine, and it was held that there could be no recovery for its loss while upon the road.[7] It has been applied to the permanent removal of household furniture;[8] and to a change of the place where the property was stored;[9] to farm machinery,[10] and to ricks of hay. Some of the policies sued upon insured plaintiff's "frame stable and building, occupied by assured as a hack, livery and boarding stable, situated," etc., and "$500, on his carriage," etc., "contained therein." One policy insured the same kind of personal property "stored in the private frame stable occupied by assured and situated" as described. A hack was taken from the stable to a repair shop about one-eighth of a mile distant, the day before it was burned, without the insurer's knowledge or consent. The rate of insurance at such shop was one per cent. greater than at the stable. While at the shop the hack was destroyed by fire. The court said that the policies do not insure a particular carriage or hack by any description by which it can be identified without reference to the stable. They do not insure all the plaintiff's carriages, etc., used in his livery business, contained in the stable described. It cannot be held that they cover only such carriages as were contained in the building named at the date of the policies. From the nature of plaintiff's business it might have been in the contemplation of the parties

[2] Bryce v. Lorillard F. Ins. Co., 55 N. Y. 240.

[3] Leitch v. Atlantic Mut. Ins. Co., 66 N. Y. 100. An open policy on goods in such stores, houses, and places as shall be approved and indorsed in a book attached, does not cover property which had been shipped. First Nat. Bank v. Lancashire Ins. Co., 62 Tex. 461.

[4] De Graff v. Queen Ins. Co., 27 Cent. L. J. 284, and note.

[5] Noyes v. Northwestern Ins. Co., 64 Wis. 415.

[6] Maryland F. Ins. Co. v. Gusdorf, 43 Md. 506.

[7] Annapolis & C. R. R. Co. v. Baltimore F. Ins. Co., 32 Md. 37.

[8] Lyons v. Providence W. Ins. Co., 14 R. I. 109, overruling 13 *Id.* 347; Harris v. Royal C. Ins. Co., 53 Iowa, 236.

[9] Phœnix Ins. Co. v. Vorhis, 1 Ohio Circuit Ct. 326.

[10] Gorman v. Hand-in-Hand Ins. Co., 11 Irish Com. Law, 224.

[11] Gorman v. Hand-in-Hand Ins. Co., *supra*.

that the chattels named might be changed from time to time during the year; some sold, some worn out. The policies are similar to an insurance of a shop-keeper on his stock of goods in his shop, or of a railroad company on its rolling-stock on its road, constantly changing. The insurance was upon such of plaintiff's articles as are described which were in his stable at the time of loss.[12]

The insurance was on household goods, furniture, clothing, etc., "all contained in his two-story frame dwelling-house and additions, occupied as a residence," also on horse, buggies, hay and barn tools. A fire damaged the house to such an extent that plaintiff removed his household goods to the barn and stored them there. It was ruled that he could not recover for the loss of them which occured while they were in the barn, although the insurer knew that they were stored there.[13] A policy upon goods "contained in the third story" of a designated building, over two specified numbers of a certain street, provided that it should be void if the property should be unnecessarily removed to any other place. When the insurance was effected the subject thereof was contained in two rooms. Subsequently the plaintiff rented a third room on the same floor of the same building, and changed the position of the property. His right to recover was not thereby defeated.[14] The second proposition in the Wisconsin case is supported by several decisions by courts of good standing. A policy upon a horse, harness, buggy and phaeton, "contained in a barn" covered the phaeton while it was at a shop for the purpose of being repaired.[15] A policy upon a horse "in barn or in fields" covers a loss which occurred in a barn subsequently built on the farm.[16] Damage sustained by fire to wearing apparel while on the person of the owner in the street, may be recovered for under a policy insuring it as "contained in."[17] The insurer is liable for the loss of a threshing machine insured as "stored in a barn on § 36, T. 23, R. 28," the loss occurring while the machine was standing in a field on the designated tract of land.[18] A policy insuring live-stock designated the premises on which they were by section, town and range. A horse which was usually kept thereon was killed while at a distance of six miles therefrom, being then driven by its owner. The insurer was held liable.[19] It was provided by the charter of a mutual live-stock insurance company, that the business thereof should be confined to a designated territory. This did not prohibit members of the company whose horses were insured within such territory from removing them beyond it for the purpose of selling them and keeping them outside of it for a reasonable time for such purpose.[20]

A recent case[21] holds that a condition in a policy insuring agricultural implements and horses which provides that, in case of their removal from the place in which they are specified to be, without assent, the risk shall cease, must be construed reasonably, because the use for which they are designed renders frequent removal essential. Hence, the policy, on a violation of the condition, ceases *pro tempore*, and re-attaches when the articles are returned to such place. This case is more consistent with the doctrine of warranty than the cases which hold that the contract is made with reference to the character of the property to which it relates and admit that the policy or the application, or both, constitute a warranty. When a warranty is expressed it is going a great length to hold that it was not the intention to express it, and this is more noticeable where there is a clause in the policy prohibiting an increase of the risk. Another reason for doubting the rule adopted by the cases last cited, is suggested by the

[12] Bradbury v. Fire Ins. Ass'n. (Maine), 15 Atl. Rep. 34. A case decided in Virginia June 1, 1889 (9 S. E. Rep. 694), takes, under an almost identical state of facts with the Maine case, the opposite view. The ruling in Niagara Ins. Co. v. Elliott (the Virginia case), insured its property "contained in" the place designated. A loss occurred while it was several hundred yards distant being repaired. A recovery was sustained.

[13] English v. Franklin F. Ins. Co., 55 Mich. 273.

[14] West v. Old Colony Ins. Co., 9 Allen, 316.

[15] McCluer v. Girard Ins. Co., 43 Iowa, 349; London & L. F. Ins. Co. v. Graves, 12 Ins. L. J. 308 (Ky. superior court.) *Contra*, Haws v. St. Paul F. & M. Ins. Co., 28 Cent. L. J. 54; three judges dissented.

[16] Trade Ins. Co. v. Barracliff, 45 N. J. L. 543.

[17] Longueville v. Western Assurance Co., 51 Iowa, 553.

[18] Everett v. Continental Ins. Co., 21 Minn. 76. See Boright v. Springfield F. & M. Ins. Co., 34 *Id.* 352; Haws v. Fire Ass'n., 7 Atl. Rep. 159; American C. Ins. Co. v. Haws, 11 *Id.* 107, all stated in note in 27 Cent. L. J. 287.

[19] Mills v. Farmers' Ins. Co., 37 Iowa, 400; Peters v. Mississippi Valley Ins. Co., 24 *Id.* 494.

[20] Coventry Mut. L. S. Ins. Assn. v. Evans, 102 Pa. St. 281.

[21] Gorman v. Hand-in-Hand Ins. Co., 11 Irish C m Law, 224.

Maine case,[22] viz., that the property can only be identified by its location as determined by the policy. Articles of wearing apparel, household goods, live-stock, wagons, etc., are not usually so described that they can be selected from others of their class without reference to their *situs*. And besides, it is probably the law that the policy attaches to new articles of the class it covers when they are substituted for others which are worn out or disposed of.

A policy upon a building described its situation, but was silent as to its removal. It was removed two hundred feet from its former location, but its location when it was destroyed was within the description of the policy, as fully as it was before removal. The effect of the change was held to be a question of fact.[23] A recent and unreported case decided by the Illinois appellate court,[24] holds that the locality and surroundings of insured property are material to the risk, and that a removal of the property, for other than temporary purposes, from the place where the policy locates it, relieves the insurer from liability for its loss. The policy issued September 30, 1884, and insured wearing apparel "contained in the two-story and basement French-roof brick dwelling, situated No. 1840 C. Avenue, Chicago." At the time stated, appellant owned the building described and resided therein, and continued so to do until November, 1885, when she leased it for one year, reserving one room and a closet for storage purposes. In the fall of 1885, appellant and her family went to Ottawa on a visit, and took with them a large portion of the wearing apparel which had been stored in the room and closet referred to, none of which was thereafter returned thereto, but was burned in Ottawa February 4, 1886. The court say that the removal of the plaintiff's wearing apparel was not such a temporary removal as the parties may be reasonably said to have had in view, nor was the place of ordinary deposit, described in the policy, continued after she commenced her visit in Ottawa.

The ordinary use of clothing in such cases does not include the using involved in long journeys, or protracted visits, during which the goods may be exposed to risks that the insurer would not have been disposed to insure.

That the locality and surroundings of insured property are always considered material by insurers in accepting or rejecting applications for insurance, is matter of common information, to which courts cannot be indifferent in the decision of questions of this character. Risks on wearing apparel commonly kept in a building of safe construction, might be taken at a low premium; in another less safe, the premium would be higher, and in still another, the risk declined. Certainly it cannot be supposed that a risk on such property, taken on ordinary terms, the place of deposit being described, attended by no circumstances raising an inference that unusual hazards were to be encountered, gives the insurer a discretion in the use of the property, which is not limited, either as to time, or distance of removal from the place of deposit so designated.

2. *From Threatened Danger.*—The policy covered a stock of groceries in a building which it particularly described "from loss or damage by fire whilst the said stock of groceries shall be and remain in the building aforesaid." The facts appear from the following instruction given to the jury: "If they should believe from the evidence aforesaid, that the loss and injury to the goods happened in consequence of their removal from the house mentioned in the policy, without the neglect or fault of the plaintiff; and, that such removal was occasioned by a fire in the neighborhood of said house, by which the said goods were exposed to such present and imminent danger, that a prudent man would not have permitted them to remain in said house; and, that as much care was used in the removal as a prudent man would have used in relation to his own goods similarly situated, then the said removal was justifiable, and the loss and injury thereby happening, covered by the policy, and the plaintiff thereby, entitled to recover."[25]

If the proximity of the fire to the building in which the insured property is situated, its progress, intensity and ravages, leave no room to doubt but that the goods were removed through a reasonable apprehension

[22] Bradbury v Fire Ins. Assn., *supra*.

[23] Griswold v. American C. Ins. Co., 1 Mo. App. 97, 70 Mo. 654.

[24] Towne v. Fire Ass'n. of Philadelphia, Dec. 7, 1888.

[25] Holtzman v. Franklin Ins. Ins. Co., 4 Cranch, C. C. 295.

that they would be destroyed by fire if suffered to remain, the insurer is liable under a policy covering loss or damage by fire, although the building from which they were removed was not burned.[26] It was provided in the policy that the insurer should not be liable for "damage caused by removal of property from a building, except that it be proved that such removal was necessary to preserve the property;" and also, that the best endeavors of the assured shall be used in saving and protecting the property from damage at and after a fire." If this last condition was not observed all claim under the policy was subject to forfeiture. While the insured's place of business was open, at 10 o'clock P. M., a fire occured in the adjoining building. In consequence of a mistake in the signals the fire department was dispatched to an improper point, and there was considerable delay in reaching the place where the fire was. The fire raged furiously and plaintiff's building was damaged thereby to the extent of several hundreds of dollars. The goods were removed by friends and neighbors of the insured, and were nearly wholly destroyed in the removal. Referring to the conditions of the policy and the facts the court observe: "Between these two conditions it is apparent that the insured is placed in a dilemma in which he must exercise his discretion as to what his duty is. Although, in the present case, the plaintiff was so occupied with his family, who were in the house, that he was unable to give his attention to the goods, we must treat the removal precisely as if he had himself ordered it. The only question is, whether it was necessary, within the meaning of the condition of the policy. That question is not to be determined by the actual result, nor by judgment of professional experts who, owing to the mistaken signals, did not reach the scene in time. It is to be determined by the circumstances of the case, as they appeared to those who acted upon them. Considering the apparent imminence of the peril, the unusual delay in the arrival of the fire department, and the inflammable nature of plaintiff's stock, we think the circumstances were such as to make the removal apparently necessary for the double purpose of saving the goods, and of controlling the fire by preventing its communication to such inflammable materials."[27] In apparent and probably real antagonism to the cases cited is a Pennsylvania case.[28] The policy was in the usual form, against fire. The fourth house from that which contained the insured property was on fire, and there was reasonable ground of apprehension that the house which contained it would be consumed, and the precaution of removing the goods was justifiable. Gibson, C. J., observes that insurers are answerable for direct and immediate, not for consequential and remote, losses from a peril insured against. When that is fire, the instrument of destruction must be fire." "The converse of the rule which charges the insurers with a loss of which the particular peril is the proximate cause, exempts them where it is the remote one; and this rule is a part of the general law of insurance, though I confess I have seen no application of it to any other policy than a marine one, except Austin v. Drewe,[29] which, however, comes entirely up to the point. In that case it was determined that a loss from heat without ignition in a process of manufacture, was not covered by a policy against fire." In considering this case Mr. May says: But the better doctrine no doubt is, that whether the removal be necessary or not, depends upon the circumstances of the case; and that if the removal be under such circumstances that it had not taken place the insured would have been guilty of negligence, he may recover, while he cannot recover if the goods are wantonly or unnecessarily removed, or perhaps if prudence did not require them to be removed.[30] And Mr. Wood says: The doctrine of this case, it is believed, does not express the true rule in such cases, and the question is made to depend upon the circumstance whether the goods were removed *ex necessitate* to prevent them from being destroyed, and there was reasonable ground to

[26] White v. Republic Fire Ins. Co., 57 Me. 91; Case v. Hartford Fire Ins. Co., 13 Ill. 676. The policy in this case was against loss or damage by fire, and contained the following condition: "In case of fire, or loss or damage thereby, it shall be the duty of the insured to use all possible diligence in saving and preserving the property; and if they shall fail to do so, this company shall not be held responsible to make good the loss and damage sustained in consequence of such neglect."

[27] Balestracce v. Firemen's Ins. Co., 34 La. Ann. 844.

[28] Hillier v. Allegheny County Mut. Ins. Co., 3 Pa. St. 470.

[29] 6 Taunt. 436.

[30] May on Insurance, § 404.

apprehend such danger.[31] Any reasonable application of the doctrine of proximate cause would, it seems to the writer hereof, have permitted a recovery in the Pennsylvania case; and such an application of that doctrine sustains the cases first cited.

[31] 1 Wood on Insurance, p. 267, note.

RESIDENCE—DOMICILE—ATTACHMENT.

KELLER v. CARR.

Supreme Court of Minnesota, May 7, 1889.

1. A temporary absence from the State of a person, having no place of abode at which summons may be served, does not constitute him a non-resident within the attachment law.

2. A person may become a non-resident, yet retain his domicile.

MITCHELL, J., delivered the opinion of the the court:

Appeal from an order refusing to vacate a writ of attachment. The writ was issued September 13, 1888, on the ground that the defendant was not a resident of the State, and the motion to vacate was made upon the ground that she was in fact a resident. The affidavits used upon the motion show, without material conflict, about this state of facts: The defendant had been a resident of the city of Minneapolis for about 10 years. On April 5, 1888, her residence was destroyed by fire, after which, and until June 7th, she boarded in the city. On the latter date she vacated her quarters in the boarding-house, stored her household goods in plaintiff's stable, and taking with her only her wearing apparel, left the State for the purpose of going to Chicago on business, and then to Canada on a visit to relatives, but with the intention of returning to Minneapolis after she completed her visit. It does not appear when she intended to return, except that she did not do so until October 15th, but that her absence was extended somewhat beyond her original intention, by reason of the sickness of her mother in Canada. It may also be fairly assumed from the affidavits that from the time she left in June until she returned in October she had no dwelling or place of abode in the State at which service of a summons could have been made upon her. The court below found, from the affidavits, that, at the time of issuing the attachment, she was absent from the State with the intention of returning thereto, but had no residence or place of abode in the State where a summons could be served on her, and therefore, that she was not a resident of the State," within the meaning of the statute relating to attachments. Gen. St. 1878, ch. 66, § 147.

Although this remedy is allowed in nearly every State against "non-resident debtors," yet as to who are included in that classification there is much conflict of opinion and confusion of ideas in the courts. Is "residence" to be construed as synonymous with "domicile," and is a debtor to deemed a resident of the State, however long his absence from it, and wherever the place of his actual abode, provided he retains the intention of returning at some distant or indefinite future date? Or is he to be deemed a non-resident every time he casually and temporarily goes out of the State, provided he leaves therein no fixed and usual place of abode, occupied by some person of suitable age and discretion with whom a summons might be left? Or, in order to render one a non-resident, whose political domicile is in the State by reason of his intention to return, must his absence be so prolonged, or for such an indefinite period, that his actual residence can no longer be said to be within the State? To solve this question we must consider the object of this remedy by attachment against non-residents. Its primary object doubtless is to furnish a remedy against the debtor's property in cases where through his absence from the State he is beyond the reach of the ordinary process of the court, so that jurisdiction of his person cannot be obtained by service of a summons. Hence, whenever the propriety of the writ against the property of a debtor as a non-resident is in issue, the statute relating to attachments should be compared with that relating to the service of summons. Under our statute a summons can be served only upon the defendant in person, or by leaving a copy "at the house of his usual abode, with some person of suitable age and discretion then resident therein."

It will be seen, therefore, if the debtor be permanently or continuously absent from the State, and have no place of abode in it, no jurisdiction could ever be obtained in an action against him, except by attachment of his property. Hence, if the first of our three interrogatories is to be answered in the affirmative, and no one is to be deemed a non-resident under this statute whose political domicile is in the State, the primary object of the remedy by attachment would be, to a great extent, defeated. Suppose, for example, a resident of this State sell or otherwise dispose of his residence, and leave the State with the intention of being absent for business or pleasure for a term of years, but with the intention of returning, his domicile would, because of this intent, be still in this State, although he no longer has any place of abode in it. During his absence, jurisdiction of his person by service of a summons could not be obtained, and therefore, unless his property could be attached as a non-resident, his creditors would be all this time powerless to collect their debts, notwithstanding he had ample property within the State. No such construction of the statute is permissible. "Residence" and "domicile" are not to be held synonymous. "Residence" is an act. "Domicile is an act coupled with an intent. A man may have a residence in one State or country, and his domicile in another, and he may be a non-resident of the State of his

domicile, in the sense that his place of actual residence is not there. Hence the great weight of authorities hold—rightly so, as we think—that a debtor, although his legal domicile is in the State, may reside or remain out of it for so long a time, and under such circumstances, as to acquire, so to speak, an actual non-residence, within the meaning of the attachment statute. On the other hand, it has never been held that a mere casual and temporary absence from the State is any ground for an attachment. If it were, no limit could be set to the oppressive use of the process. As a mere temporary presence of a non-resident debtor will not relieve his property from attachment, so the mere temporary absence of a resident debtor should not render his property subject to it; and as a person may be an actual resident of the State, although he have no fixed and usual place of abode in it, the mere temporary and casual absence of such a one from the State ought not, within the spirit of the statute, to render his property subject to attachment, although by reason of his temporary absence, and his lack of a fixed place of abode, his creditor's ability to commence suit by service of summons is for the time suspended or interrupted. The absence from the State must be so protracted as to amount to a prevention of legal remedy by the ordinary process of the court, and of such a nature that he cannot longer be deemed an actual resident. If so, his *status* is fixed; and the legal consequences attaching will not be effected by any secret *animus* or intent on his part. The question then becomes really a question of fact, whether the defendant's absence from the State has been of such a nature and duration that he has ceased to be an actual resident of the State, and this must be determined by the ordinary and obvious *indicia* of residence. This rule, which may be termed a sort of "middle ground," is, we admit, liable to the objection that it is indefinite, and furnishes no legal test by which to determine the question of residence or non-residence. But it leaves the question no more indefinite than those upon which attachments upon other grounds depend, such as that the debt was fraudulently contracted, or that the debtor has absconded with intent to defraud. Moreover, the fact of actual residence is not as difficult of proof as would be the existence of a secret *animus revertendi* upon which the question of domicile often depends. This middle ground avoids unnecessary damage to the debtor, and at the same time protects the creditor by allowing the remedy, whenever the absence of the former is such as to substantially deprive the latter of legal remedy by ordinary process. The authorities on this subject are too numerous to be cited, but may be found collated and discussed under the head of "Non-resident Debtors" in any text-book on attachments.

It remains to apply the law to the facts of this case. From this language we infer that the learned district judge adopted the view that the fact that the defendant had, during her absence, no residence or place of abode in the State where a summons could be served on her, constituted her a non-resident, within the meaning of the statute. According to our views, already expressed, this would not be conclusive of the question. No precise or definite rule can be laid down as to the exact duration of the absence which will render a person a non-resident. Each case must be governed somewhat by its own particular facts. The question is whether the debtor has become an actual "non-resident," within the meaning of that term, as we have attempted to define it. In determining this there should be considered not only the duration of the absence, but its nature a d purpose. In this case the defendant was absent prior to the attachment only about three months, and altogether only about four months, and this, it appears, was longer than she contemplated when she left. And while the important inquiry is not whether she had acquired a place of residence abroad, but whether she had ceased to be an actual resident of this State, it is important, as bearing on the latter question, that defendant had not only acquired no residence out of the State, but the purpose of her absence was not such as to require or even admit of her acquiring it. What she contemplated was a brief stay in Chicago to adjust some business with an insurance company, and then a visit to her mother, in Canada. Such an absence from the State was not materially different in its nature from that of hundreds of people who temporarily close up their dwellings, and go off south or east for health or pleasure, for weeks or even months at a time. We think it never occurred to the bar of the State that such persons, during such an absence, were non-residents, and their property subject to attachment. To so hold would, in view of the social and business habits of people in this age of travel, lead to very serious results. Order reversed.

NOTE.—"Generally speaking, it may be said that the object of foreign or non-resident attachments is to grasp the property of those who cannot be reached in the ordinary way by personal actions; * * * and it would seem to follow that, logically, foreign attachment proceedings should be applicable only to persons domiciled elsewhere. But it happens that in the statutes of almost all the States respecting foreign attachments, the favorite legislative but very indefinite term "residence" is in some form used. And this term has been generally considered to mean something less than domicile, but approaching to, and resembling it in some important particulars; what such residence is, no one has yet succeeded in saying with any approach to definiteness, and the cases upon that branch of the law are in a most distressing state of confusion and conflict."[1] In determining the *status* of parties, in re-

[1] Jacob's Law of Domicile, § 49. The above work cites the following cases in which residence has been held substantially or nearly equivalent to domicile. For convenience the general nature of each case is briefly stated in parentheses. Boucicault v. Wood (Residence under the Copyright Laws), 2 Biss. (C. C.) 34; Doyle v. Clark (Judicial Citizenship), 1 Flip. (C. C.) 536; Abington v. No. Bridgewater (Settlement), 23 Pick. (Mass.) 170;

spect to their liability to be proceeded against as non-residents, the facts in each particular case must be carefully considered.[2] It may be concluded from the cases, that in contemplation of the attachment laws generally, residence implies an established abode, fixed permanently for a time, for business or other purposes, although there may be an intent existing all the while to return at some time or other to the true domicile.[3] In determining whether a debtor is a resident of a particular State, the question as to his domicil is not necessarily always involed; for he may have a residence which is not in law his domicile. Domicile includes residence, with an intention to remain; while no length of residence, without the intention of remaining, constitutes domicile.[4] Domicile is of broader meaning than residence. It includes residence; but actual residence is not indispensable to retain a domicile after it is once acquired. It is retained by the mere intention not to change it.[5]

It has been held in New Jersey that a residence or place of abode of a temporary or permanent character, at which a summons might lawfully be served, is the condition on which process of attachment *cannot* be issued, and that if a debtor has not, at the time the writ of attachment is issued, such a place of abode that a summons could be served at it, he is a non-resident within the meaning of the statute, and may be proceeded against by attachment.[6] In another and earlier case in the same State, however, it was held that an attachment would not lie against a tenant or debtor who is in the act of removing his goods out of the jurisdiction of the court and out of the State, as an absent, non-resident, or absconding debtor, although he may have completed his tenancy, and handed over the keys, and possession of the premises recently occupied by him to the incoming tenant.[7] In a New York case it was held that an immigrant from Europe, newly arrived in New York, having no residence acquired in any other State, and having permanently abandoned his former residence, must be regarded as a resident of the State which he inhabits for the time, whether he has a place of abode at which he could be served with process, otherwise by personal delivery, or not.[8]

One who has definitely and finally abandoned his home abroad, and is living in an American hotel only until he can procure a suitable house, is, while so living at the hotel, a resident, and not a non-resident liable to attachment.[9] The test of residence where a party removes from one State to another seems to be, did he remove from his former residence with the intention of abandoning the same. If he did so leave, and in pursuance of that intention, actually went beyond the borders of the State, he would become a non-resident of that State, and upon going into another State with the intention of residing there, he will become a resident thereof.[10] The mere fact, however, of a prolonged absence from one State, and continued residence in another while attending to business or pleasure, is not in itself enough to constitute a charge of citizenship; it must appear that the person has left the former State with the intention of resigning his citizenship there. The fact that a man continues to vote in the State from which he came, and owns a farm there, tends to show that he is a citizen thereof.[11] Proof that a party went out of the State, and induced a neighbor to go with him to settle in another State, and that he was out of the State for a month after suit was brought against him, will be sufficient ground upon which to proceed against him as a non-resident by attachment.[12]

Where defendant came to the State with intent to remain, and began building a house for his family, which did not arrive for five months, it was held that his property could not be attached as that of a non-resident within one month of the time he came to the State.[13]

In a Kansas case, the facts being that defendant, in May, 1883, was a resident of Bourbon county, owning real estate and personal property therein; that at that time he sold nearly all his household goods, farming utensils, and other personal property; offered his farm for sale and placed it in the hands of land agents for that purpose; rented his farm, told many persons that he was going west to hunt another home; did go west to Colorado, and did not return to his farm till November 22, 1883, after an attachment had been levied; and then admitted that when he left Kansas in May, 1883, he did not expect to return to make it his home, it was *held*, that said defendant was a non-resident of the State of Kansas, November 12, 1883, the date the attachment was issued.[14]

In another case it was held that a person who came

Thorndike v. Boston (Tax.), 1 Met. (Mass.), 242; Dauplin Co. v. Banks (Tax.), 1 Pears (Pa.), 40; Kellog v. Supervisors (Tax.), 42 Wis. 97; Blanchard v. Stearns (Voting), 5 Met. (Mass.) 298; Opinion of the Judges (Voting), *Id.* 587; Crawford v. Wilson (Voting), 4 Barb. (N. Y.) 504; Cadwallader v. Howell & Moore (Voting), 3 Harr. (N. Y.) 138; Chase v. Miller (Voting), 41 Pa. St. 403; Fry's Election Case (Voting), 71 *Id.* 302; McDaniel's Case (Voting), 3 Pa. L. J. 315; Roberts v. Cannon (Voting), 4 Dev. & B. (N. C.) 256; State v. Grizzard (Voting), 89 N. C. 115; Dennis v. State (Voting), 17 Fla. 389; Dall v. Irwin (Voting), 78 Ill. 160; McDaniel v. King (Insolvency), 5 Cush. (Mass.) 469; Casey's Case (Insolvency), 1 Ashm. (Pa.) 126; Collester v. Hailey (Limitation), 6 Gray (Mass.), 517; Langdon v. Doud (Limitation), 6 Allen (Mass.), 423; Hallett v. Bassett (Limitation), 100 Mass. 167; State v. Aldrich (Limitation), 14 R. I. 176; Campbell v. White (Limitation), 22 Mich. 178; Venable v. Paulding (Limitation), 19 Minn. 488; Shaw v. Shaw (Divorce), 98 Mass. 158; Hinds v. Hinds (Divorce), 1 Iowa, 36; Isham v. Gibbons (Probate), 1 Bradf. (N. Y.) 69; Matter of Hawley (Naturalization), 1 Daly (N. Y. C. P.) 531; Matter of Scott (Naturalization), *Id.* 534; Matter of Bye (Naturalization), 2 *Id.* 525; Brundred v. Del Hoyo (Attachment), Spencer (N. J.), 328; Reed's Appeal (Attachment), 71 Pa. St. 378; Malone v. Lindley, 1 Phila. (Pa.) 192; Charlton Co. v. Moberly (Attachment), 59 Mo. 238; Stratton v. Brigham (Attachment), 2 Sneed. (Tenn.) 420.

[2] Wade on Attachment, § 76.

[3] Krone v. Cooper, 43 Ark. 551.

[4] Drake on Attachment, 58; citing Matter of Thompson, 1 Wend. (N. Y.) 43; Foster v. Hall 4 Humph. 346; Mitchell v. U. S., 21 Wall. (U. S.) 350.

[5] Krone v. Cooper, 43 Ark. 547.

[6] Baldwin v. Flagg, 43 N. J. L. 495. And see Waples on Attachment and Garnishment, 35.

[7] Kugler v. Shreve, 4 Dutch. (N. J. L.) 129.

[8] Heidenbach v. Schland, 10 How. Pr. 477.

[9] Knapp v. Gerson, 23 Fed. Rep. 197.

[10] Swaney v. Hutchins, 13 N. W. Rep. 282; Harteau v. Harteau, 14 Pick. (Mass.) 185; Lacy v. Clements, 26 Tex. 661; Johnson v. Turner, 29 Ark. 280; Succession of Daniel Chaster, 20 La. Ann. 383.

[11] Woodworth v. St. P., M. & M. Ry. Co. (Minn.) 18 Fed. Rep. 282.

[12] Farrow v. Barker, 2 B. Mon. (Ky.) 217.

[13] Swaney v. Hutchins, 13 Neb. 266. And where a man came to the State of Illinois, purchased a farm, and for three years carried on the business of farming, voted there, and declared his intention to make it his home, it was held that he would be regarded as a resident of the State, notwithstanding that he had never brought his family to Illinois. Wells v. The People, 44 Ill. 40; compare Baldwin v. Flagg, 43 N. J. L. 495; Wolf v. McGavock, 23 Wis. 516.

Ritter v. Phœnix Life Ins. Co., 32 Kan. 504.

to this State with the intention of becoming a resident and who had no intention of removing therefrom, was entitled to the benefit of the exemption law; and the fact that his family did not accompany him was held to be of no consequence, so long as he came with the settled purpose of abandoning his foreign residence and removing his family.[15]

In another case, one Ashbrough left Hamilton, Canada, where he had resided and done business for several years, on the 24th of September, 1870, and went to the State of New York with the intention of taking up his residence there, but his wife remained in Canada. On the third of October of that year, an attachment was issued against him in New York, on the ground that he was a non-resident. It was held, that he was a resident of the State.[16] Where the defendant occupied lodgings in the State and absconded, it was held that he was an inhabitant of the State within the meaning of the domestic attachment law.[17] And where a man was absent from the State of his domicile, doing business in another State for three years, he was held to be a non-resident of the State in which he held his domicile, and as such was liable to be proceeded against by foreign attachment.[18] But where a person residing with his family and doing business in one State leaves his family at home and goes to another State, and engages in business there, and remains for a month, with the intention of subsequently changing his place of residence permanently to the latter State, such temporary residence and intention to remove will not affect his citizenship.[19] Numerous decisions are also to be found holding that a man who has a place of business in one State and lives with his family in another, the latter must be regarded as his place of residence, and he may be sued as a non-resident by attachment in the former.[20]

It has been held in Maryland, the fact being that the debtor was absent from the State for four or five years, and there was nothing to show that he might not be absent for as many years more, that he could not be permitted to show an intention to return at some indefinite time, in the future, in order to defeat a foreign attachment sued out in said State.[21] Notwithstanding the fact that in New Jersey at least it has been held that lack of a place of abode at which summons might be served constitutes an absent person a non-resident, it would seem, in conformity with the reasoning in the principal case, that such fact should not be deemed conclusive, nor should the rule prevail in cases where it is shown that the person in question, intends within a reasonable time at least, to return.

[15] People v. McClay, 2 Neb. 7.

[16] Brown v. Ashbrough, 40 How. Pr. (N. Y.) 260. See Barrett's Case, 1 Dall. (Pa.) 152; Turneyssen v. Vauthier, 1 Miles (Pa.), 422; Kennedy v. Baillie, 3 Yeates (Pa.), 55; Lyle v. Foreman, 1 Dall. (Pa.) 480; Smith v. Storey, 1 Humph. (Tenn.) 620; Stratton v. Brigham, 2 Sneed (Tenn.), 420; Shipman v. Woodberry, 2 Miles (Pa.), 67; Wheren v. Degman, Matt. & McC. (S. C.) 323; Matter v. Wrigley, 4 Wend. (N. Y.) 602.

[17] Kennedy v. Baillie, 3 Yeates (Pa.), 55; Lyle v. Foreman, 1 Dall. (Pa.) 479.

[18] Haggart v. Morgan, 5 N. Y. 422; 55 Am. Dec. 350; Burrill v. Jewett, 2 Robt. (N. Y.) 701. Compare Brundred v. Del Hoyo. 20 N. J. L. 328.

[19] State Savings Assn. v. Howard, 31 Fed. Rep. 222.

[20] Fielding v. Lucas, 87 N. Y. 197; Lee v. Stanley, 9 How. Pr. (N. Y.) 272; Murphy v. Baldwin, 41 *Id.* 270, 11 Abb. Pr. N. S. (N. Y.) 407; Chaine v. Wilson, 16 How. Pr. (N. Y.) 552; Green v. Beckwith, 38 Mo. 384; Loder v. Littlefield, 39 Mich. 512; Perrine v. Evans, 35 N. J. L. 221; Payne v. Taylor, 10 La. Ann. 726; Wallace v. Castle, 68 N. Y. 370.

[21] Risewick v. Davis, 19 Md. 82; Weetkamp v. Loehr, 53 N. Y. Super. Ct. 79. See Article Domicile, 11 Cent. L. J. 20; Doyle v. Clark, 9 *Id.* 5.

RECENT PUBLICATIONS.

Books Received.

The Revision of the Statutes of the State of New York and The Revisers. An Address delivered before the Association of the Bar of the City of New York, January 22, 1889. By William Allen Butler. Published for the Association. New York and Albany: Banks & Bro., Law Publishers. 1889.

QUERIES AND ANSWERS.

Query No. 3.

A's horse while being driven through one of the principal streets of the city, steps upon a nail, which enters its foot, causing lockedjaw, from which the horse dies. In a suit against the city, for value of the horse can A recover? The city is under the general incorporation act of Illinois. The street was in good repair with the exception of some old nails in the filling of the street. A claims the filling was trash from a burned building put there by the city marshal several months before. A has driven over the same place many times before without an accident? X

QUERIES ANSWERED.

Query No. 1.

[*To be found in Vol. 29, Cent. L. J. p. 14.*]

An infant's vested remainder in fee may be sold for his benefit: Tyler on In. & Cov. section 194. But only under special circumstances. In Iowa such sale is permitted. Foster v. Young, 35 Iowa, 27. But is forbidden in New York by statute. Jenkins v. Fahey, 11 Hun, 351. In Rorer on Judicial Sales it is stated that the powers of probate courts are such only as are conferred by statute, and must be exercised in conformity to, and only for the causes allowed by statute. Unless the probate court had power under the statute to order a sale of the minor's land for the purpose of "distribution" such order and the sale thereunder would be void. If the term "distribution" applies to realty, it could be effected only by partition.

J. W. C.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

Alabama 9, 22, 25, 27, 31, 37, 38, 41, 75, 78, 89, 102, 103, 119
Arkansas 16, 17, 21, 43, 71, 104
California 4, 5, 12, 39, 42, 53, 56, 58, 66, 70, 83, 85, 91, 100
Colorado 67, 72, 97, 99, 115, 117
Florida 55, 63
Georgia 108
Illinois 3, 6, 10, 11, 13, 24, 26, 44, 45, 46, 49, 62, 76, 81, 84, 107 113
Indiana 20, 57, 59, 79
Iowa 7, 8, 14, 28, 29, 52, 61, 64, 82, 87, 112, 114
Kansas 68, 74, 96
Louisiana 80, 65, 92
Minnesota 19, 35, 36, 69, 86, 110, 116, 118
Missouri 18, 33, 34, 40, 51, 77, 90, 94, 106
New Jersey 47, 88
Tennessee 93, 95
Texas 32
United States C. C. 2
United States D. C. ....

UNITED STATES S. C. 15, 48, 50, 54, 60, 80, 98, 105
UTAH 23
VERMONT.....101
WYOMING TER. 73, 109, 111

1. ADMIRALTY— Salvage. —— An agreement to pay a salvor a specified sum if he succeeds in raising the engines of a sunken steamer within a certain time, and a larger sum if it requires a longer time, does not deprive the salvor of his right to a maritime lien. — *Chapman v. The Greenpoint*, (U. S. D. C.) N. Y., 38 Fed. Rep. 671.

2. ADMIRALTY— Practice. —— On a libel for damages from a collision, the case will not be reopened to examine a witness whose statements in an affidavit used on the motion in relation to the character of the blow and its effect on libelant's vessel are in direct contradiction of statements made by him in a former affidavit. — *Hatch v. The Newport*, (U. S. C. C.) N. Y., 38 Fed. Rep. 669.

3. ADVANCEMENTS.——Under Rev. St. Ill. ch. 39, § 7, a deed from father to child, expressed to be in consideration of love and affection and of a sum of money in hand paid, is not made an advancement by a recital in the father's will that the child received land from him. —*Wilkinson v. Thomas*, Ill., 21 N. E. Rep. 596.

4. APPEAL— Jurisdiction. —— In a contest between attaching creditors of a foreign corporation and intervening creditors seeking to have the corporation adjudged insolvent, the corporation failed to appear, but a judgment was rendered to the effect that the court had no jurisdiction in insolvency proceedings over such a corporation. The intervening creditors appealed: *Held*, that though the corporation had been defaulted, the judgment appealed from was one in its favor, and the effect of a reversal would be to deprive it of all control over its property. — *In re Castle Dome Mining & Smelting Co.*, Cal., 21 Pac. Rep. 746.

5. APPEAL—Practice.—— A "statement on appeal to the supreme court," made after a motion for new trial has been determined, is not provided for in Code Civil Proc. Cal., and, where it does not appear to have been settled, certified, or signed by the trial court, it cannot be considered either as a statement on motion for a new trial, or as a bill of exceptions.—*Beets v. Chart*, Cal., 21 Pac. Rep. 730.

6 APPEAL.—— A motion to amend the record of the supreme court in a criminal case so as to show that the defendants were not, as recited in the judgment, personally present when the decision affirming their conviction was rendered, comes too late when made at a subsequent term. — *Fielden v. People*, Ill., 21 N. E. Rep. 584.

7. ASSIGNMENTS. —— Where the effect of a deed is to place property in the hands of third parties for the benefit of the grantor's creditors, such third parties are "assignees," and a suit is properly brought against them as such, though the instrument is called a "trust-deed," and uses the words "in trust" and "trust property" in relation to the duties of the grantees as to the property.—*Schee v. La Grange*, Iowa, 42 N. W. Rep. 616.

8. ASSIGNMENT — Bond. —— An assignee of a mortgagee's right to damages under an indemnifying bond, given to the sheriff for the mortgagee's benefit on the levy of an execution on the mortgaged goods, cannot maintain an action on the bond, unless the mortgage debt was also assigned to him. — *Garretson v. Ferrall*, Iowa, 42 N. W. Rep. 637.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS. —— Appellant purchased goods from a firm. Subsequently creditors of the firm attached these goods, and the suit was sustained, and appellant paid the costs. The firm afterwards made an assignment, and appellant applied to the assignee for a dividend on the costs so paid, on the ground that he was a creditor to the amount of the costs: *Held*, that he was not entitled to a dividend. — *Pritchett v. Jones*, Ala., 6 South. Rep. 75.

10. ATTACHMENT. —— Where an affidavit in attachment alleges that the defendant "has within two years last past fraudulently conveyed his effects," a plea sworn to seventeen days after the affidavit, and alleging that defendant "has not within two years last past fraudulently conveyed his effects," is fatally defective. —*McFarland v. Claypool*, Ill., 21 N. E. Rep. 587.

11. ATTORNEY AND CLIENT. —— Where a party to a suit places bonds in the hands of his attorneys, so that they may be used in securing to him the benefit of a successful prosecution of the suit, and retains said attorneys to prosecute an appeal of said suit, knowing that they claim a lien on the bonds, the attorneys are entitled to a retaining lien on said bonds for their fees. —*Sanders v. Seeyle*, Ill., 21 N. E. Rep. 601.

12. ATTORNEY AND CLIENT.——Where the attorney of a corporation is employed at a salary which, as also his term of employment, may be changed at the option of the corporation, there is nothing illegal or improper in his making a contract with the corporation for a special fee in special case; no undue influence, persuasion, or misrepresentation being used by him.— *Bartlett v. Odd-Fellows' Sav. Bank*, Cal., 21 Pac. Rep. 743.

13. ATTORNEY AND CLIENT. —— Under Rev. St. Ill. 1874, providing that any written recognition of the authority of an attorney to commence a suit, duly proved as therein provided, shall be sufficient presumptive evidence of such authority, such written recognition is not evidence merely that there was authority, when the recognition was executed, but is presumptive evidence that authority exists to commence the suit at the time it is commenced. — *Stream v. Lloyd*, Ill., 21 N. E. Rep. 533.

14. BANKS AND BANKING. —— A bank receiving drafts for collection only, having claims of its own against the drawee, is not forbidden to attach his property, and thus secure priority for its debt over the drafts. — *Freeman v. Citizens' Nat. Bank*, Iowa, 42 N. W. Rep. 632.

15. BANKRUPTCY.—— An adjudication in bankruptcy that two persons named therein as constituting a firm are bankrupts, is not an adjudication that a third person, who was not named in the petition, nor in any of the proceedings, otherwise than as a creditor, is not a special partner in the same firm. — *Abendroth v. Van Dolsen*, 9 S. C. Rep. 619.

16. BROKERS.—— One who negotiates sales of goods of which he has not the possession or control, by wholesale to retail dealers for commission, is a "commercial broker" within an ordinance requiring such persons to procure license.—*Harby v. City of Hot Springs*, Ark., 11 S. W. Rep. 694.

17. CARRIERS. —— A railroad company is liable at common law, as a common carrier, while operating its trains over the road of another company. In the absence of proof to the contrary, the courts of Arkansas will presume the common law to be in force in Missouri.— *Eureka Springs Ry. Co. v. Timmons*, Ark., 11 S. W. Rep. 690.

18. CARRIERS — Passengers. —— The consent of the conductor, who had entire charge of the train, to plaintiff's riding thereon, was within the scope of his authority so as to render defendant liable for the injury if it resulted from lack of ordinary care on the part of defendant's servants, though the conductor was forbidden to carry passengers on that train, and though plaintiff was permitted to ride without payment of fare. — *Whitehead v. St. Louis M. I. & S. Ry. Co.*, Mo., 11 S. W. Rep. 751.

19. CONTEMPT.—— Counsel trying a cause, while he may except to the rulings and orders of the court, is bound to respect and obey them. If, after the court has ruled against a particular course of examination of a witness, he still persists in the same course of examination, he may be guilty of a contempt.— *State v. District Court*, Minn., 42 N. W. Rep. 598.

20. CONTRACT—Statute of Frauds. —— An agreement by one person to indemnify another for any loss he might sustain by reason of entering into a recognizance for the appearance of a defendant to answer an indictment is valid as an original agreement, and not

within the statute of frauds.—*Keesling v. Frazier*, Ind., 21 N. E. Rep. 552.

21. CONTRACT. —— Where stock is loaned to be returned with earnings on demand, and the stock becomes worthless before demand made, without the fault of the borrower, he is not liable to the lender for its previous value. — *Parker v. Gaines*, Ark., 11 S. W. Rep. 693.

22. CONTRACTS.——A contract by which plaintiff is to to serve defendants as a traveling salesman for a certain term, his compensation to be half the profits made on sales, effected through his agency, he to pay his own expenses, and defendants to furnish samples, and, to enable him to meet expenses until profits are realized, to honor his orders on them for $50 every two weeks during his employment,—binds defendants to make such payments, not as compensation, but as loans, the rights of the parties to be adjusted on settlement of the profits. — *Beck v. West*, Ala., 6 South. Rep. 70.

23. CONSTITUTIONAL LAW. —— So far as § 1, of the act providing for the payment of jurors, witnesses, and phonographic reporters, and creating and defining the duties of court commissioners, undertakes to change amount of compensation fixed by acts of congress for services theretofore rendered as witness or juror, it is void, being an attempt to take away vested rights. — *People v. Pyper*, Utah, 21 Pac. Rep. 722.

24. CONSTITUTIONAL LAW—Civil Rights. —— Laws Ill. 1885, p. 64, § 1, provides that all persons shall be entitled to the full and equal enjoyment of the accommodations, privileges, etc., of theaters, subject only to the limitations allowed by law, and applicable alike to all citizens. Section 2 prescribes a penalty for violating such provision. Plaintiff, a negress, having procured, through a white person, a ticket to the "first balcony" in a theater, was denied admission thereto, and afterwards to every part of the theater, on account of her color: *Held*, that she could recover the penalty.— *Baylies v. Curry*, Ill., 21 N. E. Rep. 595.

25. CONTRACT — Reformation. —— A bill to reform a deed for fraud and mistake, which alleges that complainant was illiterate, and did not understand English, and relied on his agent, who by collusion with defendants omitted from the papers the clause showing a retention of a vendor's lien as agreed, is good on demurrer.—*Kinney v. Ensmenger*, Ala., 6 South. Rep. 72.

26. CORPORATIONS.——An "association, or number of persons," who, in conducting the business of insurance, profess to limit their liability to the amount of money contributed by each, and assume to give perpetuity to the business by making membership certificates transferable by the assignment of the member or his personal representatives, are "acting as a corporation," so as to authorize a judgment of ouster on *quo warranto* under Rev. St. Ill. 1874, ch. 112, where they are not legally incorporated.—*Greene v. People*, Ill., 21 N. E. Rep 605.

27. CORPORATIONS. —— Under Code Ala. 1886, § 1677, providing that stockholders of private corporations shall have the right to inspect the books and records of the corporation at reasonable times, it is not necessary for the stockholder, in order to exercise the right, to show any reason making such examination necessary. —*Foster v. White*, Ala., 6 South. Rep. 88.

28. COSTS IN CRIMINAL CASES.——Under Code Iowa, § 1546, providing that, when intoxicating liquor is taken on a search-warrant, and no one is made defendant, the costs shall be paid as in criminal cases where the prosecution fails, a justice issuing such process can recover fees therefor against the county, though no liquors were found. — *Garrett v. Polk County*, Iowa, 42 N. W. Rep. 619.

29. CO-TENANTS.—— A deed of right of way to a railroad company through an eighty-acre tract covenanted that the water on the south-east side of the road should be made to run on the same side of the road, instead of through cattle-guards. The grantor afterwards conveyed 135 acres of his farm to plaintiff, of which but 29 acres were a part of the eighty-acre tract: *Held*, that for the breach of the covenant a recovery should not be restricted to the damage of the eighty acre tract, nor than to anything less than the grantor's whole farm, of which the eighty-acre tract was a part, and that plaintiff's right of recovery extended to the damage of his 135 acres. — *Peden v. Chicago, R. I. & P. Ry. Co.*, Iowa, 42 N. W. Rep. 625.

30. CRIMINAL LAW— Threats. —— A threat to burn a dwelling-house is a threatened breach of the peace, as it puts the party threatened in fear, and excites him to personal prowess to protect his person and property.— *State v. Murphy*, La., 6 South. Rep. 107.

31. CRIMINAL LAW—Murder.—— When applied to the charge of murder, malice does not mean "the intentional doing of an unlawful act," and it is error to so define it, as any intentional and unlawful homicide would thus be malicious, even if committed under provocation such as to repel the idea of design.— *Cribbs v. State*, Ala., 6 South. Rep. 109.

32. CRIMINAL LAW— Murder. —— There being testimony that the killing resulted from a quarrel, the jury should have been charged that, though defendant provoked the contest, if he had no intention of killing or of seriously injuring deceased he would still have the right of self-defense, in which case the homicide might be reduced to a grade less than murder. — *Cohn v. State*, Tex., 11 S. W. Rep. 723.

33. CRIMINAL LAW—Larceny. —— On trial for grand larceny of money from a dwelling-house, under Rev. St. Mo. § 1309, an instruction that if defendant stole the amount required to make grand larceny he should be convicted without regard to where the crime was committed, and that, if it was not committed in a dwelling-house, the jury should assess his punishment at not more than five years nor less than two years in the penitentiary, and at not less than two nor more than seven years, if committed in a dwelling-house, is misleading, where there is no evidence that the money was stolen elsewhere than in a dwelling-house. — *State v. Patterson*, Mo., 11 S. W. Rep. 728.

34. CRIMINAL LAW—Seduction.——Under Rev. St. Mo. § 1259, providing that "if any person shall, under promise of marriage, seduce and debauch any unmarried female of good repute, under 21 years of age, he shall be deemed guilty of a felony," etc., the indictment need not allege that defendant was unmarried, nor that the person seduced agreed to marry him, nor that she was of sufficient age to negotiate marriage.— *State v. Primm*, Mo., 11 S. W. Rep. 732.

35. CRIMINAL LAW — Adultery. —— Upon an indictment for adultery it need not be alleged in the indictment, nor proved on the trial, that the prosecution was commenced on the complaint of the husband or wife.— *State v. Prechit*, 42 N. W. Rep. 602.

36. CRIMINAL LAW—Perjury. —— An oath not administered pursuant to, nor required nor authorized, by any law, cannot be made the basis of a charge of perjury.—*State v. McCarthy*, Minn., 42 N. W. Rep. 599.

37. CRIMINAL LAW—Murder. —— On trial for murder, the evidence showing that defendant was walking about five feet in advance of deceased, who was of bad reputation for violence, armed with a stick, and had previously threatened defendant, and that upon deceased's using threatening language defendant jumped across a small ditch, and at once wheeled and shot deceased, it is not error to charge that, to justify homicide on the ground of self-defense, it must not appear that defendant was in fault in bringing on the necessity of the homicide, by provoking the difficulty.—*Blackburn v. State*, Ala., 5 South. Rep. 96.

38. CRIMINAL LAW—Adultery.—— Evidence held sufficient to authorize finding of jury that defendant was living in state of adultery.—*Smith v. State*, Ala., 6 South. Rep. 71.

39. CRIMINAL LAW—Murder. —— On a trial for wife-murder where the conduct of the trial judge was calculated to give the jury the impression that he thought defendant guilty, and the prosecuting attorney made

objectionable statements calculated to influence the jury, though the court instructed the jury to pay no attention to such statements, a conviction and sentence of death would be set aside, and a new trial granted.—*People v. Bowers*, Cal., 21 Pac. Rep. 752.

40. CRIMINAL PRACTICE—Instructions.—— Though it is error, under Rev. St. Mo. §§ 1908, 1920, to give oral instructions, yet such error is not cause for reversal, where they were given at the request of defendant, who saved no exceptions thereto. — *State v. De Mosse*, Mo. 11 S. W. Rep. 781.

41. CRIMINAL PRACTICE — Witness. —— Under Const. Ala. art. 1, § 7, providing that an accused "shall not be compelled to give evidence against himself," evidence on a trial for burglary, that on arresting defendant, prosecuting witness told him that if he would make tracks on the carpet, and if those tracks did not correspond with those made by the burglar, defendant should be released, and that defendant declined this offer, is inadmissible.—*Cooper v. State*, Ala., 6 South. Rep. 110.

42. CRIMINAL PRACTICE—Former Jeopardy.——Defendant was charged with felonious assault, and the proof showed an assault on a person having an entirely different name from the one alleged in the indictment, and who had never been known by the alleged name, and a verdict of not guilty was ordered, and a new information preferred. *Held*, that defendant has not been once in jeopardy, notwithstanding section 956, providing that, where an offense involving the commission of a private injury is in other respects sufficiently described to identify the act, an erroneous allegation as to the person injured is not material.—*People v. Orellens*, Cal., 21 Pac. Rep. 724.

43. DAMAGES.—— Under Mansf. Dig. Ark. §§ 5223, 5226, in an action for the benefit of a father for the death of an unmarried son, plaintiff can recover only by showing that deceased gave assistance to his father, contributed money to his support, or that the father had reasonable expectation of pecuniary benefit from the continued life of the son, the reasonable character of this expectation to appear from the facts in proof. — *Fordyce v. McCants*, Ark., 11 S. W. Rep. 694.

44. DEED — Cancellation. —— Where in a suit to set aside a deed on the grounds of the grantor's mental incapacity, and the grantee's fraudulent representations, the evidence shows that the grantor was 71 years old, and in feeble health; that the grantee was her step-son, in whom she had confidence, that the property was worth about $2,000, and the price paid was but $115,—the fact that the evidence as to the representations is sharply conflicting will not warrant the reversal of a decree for complainant.—*Hoobler v. Hoobler*, Ill., 21 N. E. Rep. 571.

45. DESCENT AND DISTRIBUTION. —— Under Rev. St. Ind. §§ 2483, 2487, the child of a first wife has no such interest in the land that descends to the childless second wife as entitles him to an injunction against her for waste. His interest is not that of a remainder-man or reversioner, but merely that of an expectant heir.—*Keesling v. Frazier*, Ill., 21 N. E. Rep. 552.

46. DIVORCE.—— Upon the facts in evidence custody of a younger son was given to the mother and of the older son to the father, — *Umlauf v. Umlauf*, Ill., 21 N. E. Rep. 600.

47. DIVORCE. —— Where the common law is in force a divorce *a thoro et mensa* does not change the property rights of the parties. Its only effect is to compel the parties to live apart, and to deprive the husband of his control over his wife.— *Supreme Council Amer. Legion of Honor v. Smith*, N. J., 17 Atl. Rep. 770.

48. EMINENT DOMAIN—Notice.—— A published notice of the proposed taking of land for a railroad, and of a meeting of commissioners on a day named to lay off the route and assess damages, directed "to all persons owning land on the line of the railroad as the same is now or may be located through section 23, township 11, range 25, in the county of Wyandotte, and State of Kansas," is a sufficient notice to the owners of a quarter section of land in that section that some portion of their land may be taken for the railroad.— *Huling v. Kaw Val. Ry. & Imp. Co.*, (U. S. S. C.), 9 S. C. Rep. 603.

49. EMINENT DOMAIN.—— Upon trial of a petition for condemnation of a railroad right of way through a farm, an offer, made in open court by the company's attorney, to fence its right of way before the time required by the law, is binding upon the company.—*Elgin, Joliet & E. R. Co. v. Fletcher*, Ill., 21 N. E. Rep. 577.

50. EQUITY—Jurisdiction.——Where plaintiff sought to have contract for sale of real estate rescinded for fraud, and defendants answered and evidence thereunder was taken: *Held*, too late for the latter to object to the jurisdiction on the ground that plaintiffs had an adequate remedy at law. —*Kilbourn v. Sunderland*, (U. S. S. C.), 9 S. C. Rep. 594.

51. ESTOPPEL — Deed. —— Where the grantee in a deed is herein stated to be a corporoation, duly organized, etc., and the deed contains covenants of warranty, binding the grantor and his heirs, neither he nor they can afterwards deny the grantee's corporate existence, or its capacity to take and hold the land conveyed, as against those claiming under the deed. — *Ragan v. McElroy*, Mo., 11 S. W. Rep. 732.

52. EXCHANGE — Damages. —— Where plaintiff and defendant agree to an exchange of lands, and after the exchange defendant's title to the land conveyed by him fails entirely, the measure of plaintiff's damages is the reasonable market value of the land at the time of failure of title.— *Stewart v. Jack*, Iowa, 42 N. W. Rep. 633.

53. FALSE REPRESENTATIONS. ——Where one acts for himself and a third person in making a contract to convey land to plaintiff, and represents that he owns such land, and plaintiff, in reliance on such representation, deposits money with him, to be applied on the purchase price, and he divides such money between himself and the third person, neither of them having any title to the land, and not conveying it to plaintiff within the time specified, they are jointly liable for the amount deposited.—*Dashway Ass'n v. Rogers*, Cal., 21 Pac. Rep. 742.

54. FEDERAL COURTS.—— Where every jurisdictional requirement of the act of 1875 is complied with, a suit in a district in one State, for a cause not arising there, between a plaintiff residing in another State and a corporation of a third State, will not be dismissed because by the local statutes the State courts have no jurisdiction. — *Witherspoon v. Massachusetts Ben. Ass'n.*, (U. S. C. C.) N. Y., 38 Fed. Rep. 625.

55. HABEAS CORPUS. —— It is not the function of a writ of *habeas corpus* to bring in review any irregularity or mere error of procedure committed by a judicial tribunal having jurisdiction of the cause and the person, and under whose final judgment a party claiming to be unlawfully restrained of his liberty may be held. —*Ex parte Bowen*, Fla., 6 South. Rep. 65.

56. HOMESTEAD — Declaration. —— In California a declaration of homestead by a wife is not invalid because not filed for record on the day of its acknowledgment, nor because it is not filed by her in person. — *Farley v. Hopkins*, Cal., 21 Pac. Rep. 737.

57. INFANT. —— Evidence sufficient to justify finding that there was a complete ratification of conveyance of land by infant.—*Buchanan v. Hubbard*, Ind., 21 N. E. Rep. 538.

58. INJUNCTION. —— Hydraulic mining is not of itself unlawful or necessarily injurious to others; that the neglect to properly care for the *debris* resulting therefrom, only is unlawful; that the sale of the water is not unlawful; and that, as the complaint did not show that it was sold with knowledge that it was to be used in such manner as to injure plaintiff it stated no cause of action.—*Yuba County v. Cloke*, Cal., 21 Pac. Rep. 740.

59. INSURANCE— Warranty. —— The policy provided that "if the property shall hereafter become mortgaged or incumbered this policy shall be null and void:" *Held*, that the allegation of the answer that a judgment was recovered and entered against the insured, and became an incumbrance on the property, constituted no de-

fense, as this was not the kind of incumbrance contemplated, nor did it show a continuing incumbrance. — *Phœnix Ins. Co. v. Pickel*, Ind., 21 N. E. Rep. 546.

60. INSURANCE—Evidence.—— A physician's certificate of death, when made *ex parte*, is not proof of the cause of death as against the opposite party, but when explained and affirmed at the trial as to its statements by the physician who made it, it may be considered as part of the evidence.— *Davey v. Ætna Life Ins. Co.*, (U. S. C. C.) N. J., 38 Fed. Rep. 650.

61. INSURANCE. —— Upon the facts held that house was "vacant and unoccupied" within the meaning of clause in the policy avoiding liability for vacant and unoccupied buildings. — *Snyder v. Firemans' Fund Ins. Co.*, Iowa, 42 N. W. Rep. 630.

62. INSURANCE COMPANIES.——Rev. St. Ill. 1874, ch. 73, § 29, provides that whenever the existing or future laws of any State shall require of insurance companies, incorporated under the laws of Illinois, any deposit, or the payment of any tax, license fee, etc., greater than the amount required for such purposes from similar companies by the then existing laws of Illinois, then all companies of such State shall be required to pay to the auditor for taxes, license fees, etc., an amount equal to the amount required by the laws of such other State: *Held*, that this section becomes operative upon the enactment by the other State of the law with the additional requirements, and it is immaterial that there are no Illinois companies doing business in such State. — *Germania Ins. Co. v. Swigert*, Ill., 21 N. E. Rep. 530.

63. INTOXICATING LIQUORS. —— Whenever the local option article of the constitution prohibiting the sale of intoxicating liquors, wines, or beer is put in operation in any county or any election district, it suspends, during the period of its operation therein, the provisions of all statutes authorizing or licensing the sale of intoxicating liquors. — *Butler v. State*, Fla., 6 South. Rep. 67.

64. INTOXICATING LIQUORS. —— Under Code Iowa, § 1551, when an information is filed by a constable for a warrant for the search of premises and seizure of intoxicating liquors kept for illegal sale, an attorney selected by the constable to prosecute such suit is entitled to receive five dollars from the county for such services. — *Nichols v. Polk County*, Iowa, 42 N. W. Rep. 627.

65. INSOLVENCY—Syndic. —— The duties of a provisional syndic consist in keeping, as a deposit, all the effects of an insolvent debtor, in performing all conservatory acts which may be necessary in demanding and receiving rents and income of the property, in collecting all claims which may become due during his administration, and in accounting to the definite syndic as soon as he is appointed. — *Pitcher v. Their Creditors*, La., 6 South. Rep. 96.

66. JUDGMENT.——Where it is proved in an action on a judgment that there was no service of summons on, or authorized appearance by defendant, when the judgment was recovered, on the ground that defendant does not show a meritorious defense to the original action.—*Hill v. City Cab & Transfer Co.*, Cal., 21 Pac. Rep. 728.

67. JUDICIAL SALES. —— The title of a purchaser in good faith, which rests upon a voidable decree in chancery, the purchase being made after the entry thereof, and before a writ of error thereto is sued out, is not affected by a subsequent reversal of the decree on error.—*Cheever v. Minton*, Col., 21 Pac. Rep. 710.

68. JURY — Exemptions. —— The exemption of an elector from service upon a jury is not a disqualification, but a personal privilege which he may waive, and, if he does so, parties have no ground of complaint. — *State v. Stunkle*, Kan., 21 Pac. Rep. 675.

69. LIBEL. —— In a civil action for libel, where the words published are libelous on their face, being unambiguous and incapable of an innocent meaning, it is both the right and the duty of the court to instruct the jury, as a matter of law, that they are defamatory. — *Smith v. Stewart*, Minn., 21 N. W. Rep. 595.

70. LIMITATION OF ACTIONS. —— A complaint by pledgeors of personal property against the administratrix of the bailee, praying for the recovery of the specific property, if to be had, and, if not, for its value, payable in the due course of administration, and an amended complaint stating the same facts, but omitting the prayer for the return of the property *in specie*, and asking only for judgment for its value, aver one and the same cause of action, and the statute of limitations ceases to run at the filing of the original complaint.— *Vanderslicer v. Matthews*, Cal., 21 Pac. Rep. 748.

71. MASTER AND SERVANT — Fellow servants. —— A yard-inspector, whose duties are to examine all cars as soon as they arrive, repair all slight defects he finds in them, and, in case of more serious defects, mark them "B. O.," and have them sent to the repair-shops; and a yard-foreman, whose duties are to make up trains in the yard, couple cars, and move cars marked "B. O." to the repair tracks,—neither of whom are subject to the orders of the other, both being under the direction of a yard-master, are fellow-servants, and neither can recover for the other's negligence.—*St. L. I. M. & S. Ry. Co. v. Rice*, Ark., 11 S. W. Rep. 699.

72. MASTER AND SERVANT. —— A superintendent of the work of extending a line of railroad, who has foremen and workmen under him, whom he employs and discharges at pleasure, and who has entire control of the cars, tools, machinery, and men employed, is not a fellow-servant with the workmen, so as to preclude the latter from recovering damages against the railroad company for injuries resulting from the negligence of such superintendent.— *Denver, S. P. & P. R. Co. v. Driscoll*, Colo., 21 Pac. Rep. 708.

73. MASTER AND SERVANT. —— Defendant not liable for the negligence of a gang boss as a vice principal in exclusive control of a department. — *McBride v. Union Pac. Ry. Co.*, W. Ter., 21 Pac. Rep. 687.

74. MASTER AND SERVANT. —— Under the facts defendant held not guilty of negligence where plaintiff was injured in a mine by machinery with which he was familiar.—*Palmode v. Harter*, Kan., 21 Pac. Rep. 679.

75. MASTER AND SERVANT.—— In an action against a railroad company under Code Ala. §§ 2590-2592, extending the liability of a master, under certain circumstances, to cases in which the injury has resulted from the negligence of a fellow employee, unless the person injured knew of the defect or negligence causing the injury, and failed to notify his employer, the absence of contributory negligence need not be set out in the complaint.—*Columbus & W. Ry. Co. v. Bradford*, Ala., 6 South. Rep. 90.

76. MORTGAGES. —— Complainant being indebted to J conveyed certain land to him by deed absolute, and at the same time gave his note for the amount of the debt, and the parties executed a contract by which J agreed to reconvey to complainant on payment of the note, and in the mean time J was to have possession of the land, and was to apply the net profits in payment of the note: *Held*, that the transaction constituted a mortgage.— *Jackson v. Lynch*, Ill., 21 N. E. Rep. 580.

77. MORTGAGES — Satisfaction. —— A conveyance of the fee in land by quitclaim deed to the beneficiary in a deed of trust on the land does not operate as a satisfaction of such trust-deed, where there is no evidence of a marginal satisfaction nor of an intention on the part of the parties to the quitclaim deed to cancel the trust-deed.—*Collins v. Stocking*, Mo., 11 S. W. Rep. 750.

78. MORTGAGES. —— A judgment creditor of an insolvent estate, whose judgment has not been filed against such estate within nine months after the decree of insolvency, has no right to redeem from a mortgage foreclosure sale of the insolvent's property.— *Walden v. Speigner*, Ala., 6 South. Rep. 80.

79. MUNICIPAL CORPORATIONS.——Where a city adopts a plan of sewerage or drainage, and contracts for its construction, and it is constructed in accordance with the plan so adopted by the city, it is liable for injuries caused to a property owner by reason of its negligence in devising the plan, and in constructing an improper

drain creating a nuisance.— *City of Seymour v. Cummins*, Ind., 21 N. E. Rep. 549.

80. MUNICIPAL CORPORATIONS.——Under Rev. St. Ohio, § 3283, providing for use of railroad tracks in streets it authorizes a recovery for such damages to land lying on a street intersecting one so taken by a railroad company with the consent of the municipal government, and within thirty-three feet of, but not touching, the one on which the track is laid. — *Shepherd v. Balt. & O. R. R. Co.*, (U. S. S. C.), 9 S. C. Rep. 598.

81. NEGLIGENCE. —— That the rule of law as to negligence in children is that they are required to exercise only that degree of care and caution which persons of like age, capacity, and experience might be reasonably expected to naturally and ordinarily use in the same situation and under the same circumstances, provided that the parents or persons having the control of such children have not been guilty of a want of ordinary care in allowing them to be placed in such circumstances," is proper. — *Illinois Cent. R. Co. v. Slater*, Ill., 21 N. E. Rep. 575.

82. NEGOTIABLE INSTRUMENTS. —— A note reading "We promise to pay," and signed with the name of a corporation and the names of its president and secretary, with the additions of their respective official designations, binds the president and secretary personally; and extrinsic evidence is inadmissible to show that it was not so intended. — *McCandless v. Belle Plaine Canning Co.*, Iowa, 42 N. W. Rep. 635.

83. NEGOTIABLE INSTRUMENTS. —— Civil Code Cal. § 3135, providing that "the apparent maturity of a promissory note payable at sight or on demand is," six months after date, if it does not bear interest, etc., does not overturn the rule that as to the maker of a note payable on demand is due presently without any demand, but, as shown by the context, relates to the rights and obligations of indorsers, etc. — *Cousins v. Partridge*, Cal., 21 Pac. Rep. 745.

84. PARTITION.——A decree of partition which divides ten acres of farming land into seven lots, each forty-seven feet wide by 1,315 feet deep, will not, in the absence of any testimony showing special damage, be set aside on the objection of a party to whom is decreed two of said lots adjacent to each other and to other land owned by him. — *Koehler v. Klein*, Ill., 21 N. E. Rep. 574.

85. PLEADING—Answer. —— A so-called "cross-complaint" in an action on a note, alleging facts from which the conclusion follows that the note was given without consideration, amounts only to a defense to the action, and is insufficient as a cross-complaint.—*Shain v. Belvin*, Cal., 21 Pac. Rep. 747.

86. PLEDGE. —— In the case of a pledge, the parties may by contract make it the duty of the pledgee to sell the property pledged within a specified time. In the absence of some such contract, the duty of the pledgee is to exercise ordinary care, and he is liable only for neglect of such care.—*Cooper v. Simpson*, Minn., 42 N. W. Rep. 601.

87. POWER OF SALE. —— Where an executor under a will giving a power of sale sold the land at private sale for apparently its full value, after giving public notice, the district court had no authority to set aside the sale. —*In re Bogger's Estate*, Iowa, 42 N. W. Rep. 639.

88. PRINCIPAL AND AGENT. —— One who undertakes to settle a debt for another cannot purchase it on his own account.—*Albertson v. Fellows*, N. J., 17 Atl. Rep. 816.

89. PROBATE COURTS.——The effect of Code Ala. 1886, § 2129, authorizing the probate court to correct any mistake in the description of land sold under its order, is simply to correct misdescriptions, and the validity of the sale in other respects is not adjudicated.— *Brown v. Williams*, Ala., 6 South. Rep. 111.

90. PROBATE COURTS. —— Rev. St. Mo. 1879, § 245, authorizing the probate court to order the payment of legacies and distribution of shares, gives the court jurisdiction to adjust the distributive shares by the deduction of advancements of real estate, although it cannot decree a partition of real estate; as in adjusting advancements under the law of hotchpot it deals only with the value of the advancement, and not with the thing advanced *in specie*. — *Elliot v. Wilson*, Mo., 11 S. W. Rep. 739.

91. QUIETING TITLE — Presumptions. —— Question, upon the facts, as to the presumption of ownership of real estate arising from evidence of possession.— *Bryan v. Toomey*, Cal. 21 Pac. Rep. 725.

92. RAILROAD COMPANIES. —— A railroad company, running and operating its road through the streets of a populous city, is bound to observe extraordinary precautions for the safety of the public, particularly at street crossings. — *Curley v. Illinois Cent. R. Co.*, La., 6 South. Rep. 103.

93. RAILROAD COMPANIES. —— A railroad company occupying a street under license from a city government, having authority to confer such license, is not a trespasser as to the abutting owner. — *Iron Mountain R. Co. v. Bingham*, Tenn., 11 S. W. Rep. 704.

94. RAILROAD COMPANY. —— Municipal ordinances regulating the rate of speed of trains, and requiring certain signals to be displayed on moving trains at night, within the limits of the muncipality, apply to the private switch-yards of a railroad company, situated within those limits.—*Grube v. Missouri Pac. Ry. Co.*, Mo., 11 S. W. Rep. 736.

95. RAILROAD COMPANY.——In an action by an abutting lot-owner, having merely an easement in the street, against a street railway company, for damages for an alleged unlawful obstruction of the street, the court charged that plaintiff was entitled to the free and unobstructed use of the street for purposes of ingress and egress to and from her lot, and that the impairment of such use would be an element of damages: *Held*, that the charge was as favorable to plaintiff as the law warranted.—*Smith v. East End St. Ry. Co.*, Tenn., 11 S. W. Rep. 709.

96. RECEIVER.——Where a national bank is insolvent, and in process of voluntary liquidation, and its affairs are being greatly mismanaged by its managing agents, to the injury of its creditors and stockholders, and some of the creditors and stockholders are being favored to the injury of others, a receiver may be appointed at the instance of one of the stockholders not favored, and a provisional receiver may be appointed in such a case, even where the bank only has been made a defendant. — *Elwood v. First Nat. Bank*, Kan., 21 Pac. Rep. 673.

97. REPLEVIN.—— In an action for claim and delivery of personal property plaintiffs may declare generally, claiming the property as theirs, and give in evidence special facts to establish the fraud by which defendants obtained possession of the goods.— *Benesch v. Waggner*, Colo., 21 Pac. Rep. 706.

98. SALE — Rescission. —— Where one contracts to furnish machinery of a certain description and quality and sets the same up and puts it in complete operation in another's mill, the price to be paid partly on the delivery of the machinery, the mill owner is not compelled, in order to entitle him to avoid paying the whole contract price, or to recover damages for breach of the contract, to take out the machinery set up, upon discovering that it is unsatisfactory. — *Stillwell & Bierce Manuf'g. Co. v. Phelps*, (U. S. S. C.), 9 S. C. Rep. 601.

99. SALE.——Under the facts there was not a sufficient notice of change in the ownership to comply with Gen. St. Colo. ch. 43, § 14, providing that every sale of goods, unless accompanied by immediate delivery, and followed by actual and continued change of possession, shall be conclusively presumed fraudulent as against the vendor's creditors. — *Sweeney v. Coe*, Colo., 21 Pac. Rep. 705.

100. SALE — False Representations. —— In an action for damages for alleged fraudulent representations made on the sale of a newspaper to plaintiff, evidence as to the number of subscribers to the newspaper some time before the sale, though immaterial, cannot harm

defendant, where he does not claim that the number so shown is too small. — *Hanscom v. Drullard*, Cal., 21 Pac. Rep. 736.

101. SALE—Warranty. —— Representations as to the soundness of a horse, made by the owner to the agent of one proposing to purchase, will not affect a subsequent sale negotiated by the same agent acting for a different principal, the vendor being ignorant of the fact that the agent relies on them in making the purchase.—*Moore v. Haviland*, Vt., 6 South. Rep, 725.

102. SALE. —— Where goods are sold upon express agreement that they are to be paid for on receipt of the invoice, the title does not pass until such payment; and, where the vendee fails to comply with the condition, the vendor may recover the goods from a third person, to whom the vendee has sold them in payment of a pre-existing debt.—*Harmon v. Goetter*, Ala., 6 South. Rep. 93.

103. SURETIES. —— A contract of suretyship in form of a bond to a sheriff in a claim suit is not vitiated as to the sureties who have signed and delivered it to the sheriff by the act of the latter in procuring subsequently the signature of another surety. — *Anderson v. Bellinger*, Ala., 6 South. Rep. 82.

104. TAXATION. —— Under the law in force, when a decree for delinquent taxes was rendered against the land of plaintiff, a *feme covert*, married women had two years after the removal of the disability of coverture in which to redeem from a tax-sale. Before the sale, that act was expressly repealed, by which two years from the date of sale was allowed for redemption: *Held*, that the latter act must determine plaintiff's rights of redemption. — *Thompson v. Sherrill*, Ark., 11 S. W. Rep. 689.

105. TAXATION—Exemption.—— Immunity from taxation does not pass merely by a conveyance of the "property and franchises" of a railroad company under a tax-sale, in a suit brought by the State to enforce a statutory lien, though such company's property was held by it exempt from taxation.—*Pickard v. East Tenn., V. & G. R. Co.*, 9 S. C. Rep. 640.

106. TAXATION. —— Though act Mo. March 23, 1868, known as the "Township Aid Act," has by this court been held to be unconstitutional, the bonds issued under it are proper subjects of compromise, and a tax levied to pay compromise bonds issued under 2 Rev. St. 1879, p. 848, is valid.—*State v. Hannibal & W. J. R. Ry. Co.*, Mo., 11 S. W. Rep. 746.

107. TAX-TITLES.——The provisions of 2 Starr & C. St. Ill. p. 2093, § 194, which require the county clerk to make and enter upon the tax judgment record a certificate that the record is correct, and that judgment has been rendered upon the property therein mentioned, and make such certificate the process on which the property shall be sold, are mandatory, and tax-sales made without such certificate are void. — *Ames v. Sankey*, Ill., 21 N. E. Rep. 579.

108. TRUSTEE.——Where a master, who is ordered to deposit the funds in his hands as master, deposits it to his own individual account with his own funds, and draws on it from time to time as his own funds, he is chargeable as a trustee for its earnings while in his custody. — *Van Doren v. Van Doren*, N. J., 17 Atl. Rep. 805.

109. TRUSTS—Husband and Wife.——Evidence that a wife loaned her husband money with which to buy oxen; that he bought the oxen, it not being shown that he did not take the title in his own name; and that he exchanged a part of them for land, the title to which he took in his own name,—does not establish a resulting trust in the wife. — *Culver v. Graham*, Wy., 21 Pac. Rep. 694.

110. TRUSTS. —— Section 7, ch. 43, Gen. St. 1878, must be construed as abolishing all trusts in land, paid for by one person, where the conveyance is to another absolutely, whether for the benefit of the person paying the money or for some other person, excepting in cases where the conveyance is so taken without the knowledge or consent of the person whose money has been used, or where the alienee, in violation of some trust, has purchased the land so conveyed with moneys belonging to another person. — *Connelly v. Sheridan*, Minn., 42 N. W. Rep. 595.

111. VENDOR AND VENDEE. —— Where the vendee of land pays part of the price, and gives his notes for the balance, and by agreement the deed is left in escrow, to be delivered "when said notes are fully paid, with interest," time is not of the essence, and the vendor cannot, on non-payment of the notes, without returning them or notifying the vendee of his intention, rightfully repudiate the contract, and sell the land to a third person. — *Johnson v. McMullin*, Wy., 21 Pac. Rep. 701.

112. VENDOR AND VENDEE. —— Certain land-agents corresponded with defendant in reference to a sale of his interest in certain land. They were negotiating with certain persons, and informed defendant of these negotiations. These having failed, the agents did not disclose the fact to defendant, but opened negotiations with plaintiff to buy the land, still leading defendant to believe that he was to sell to the former persons: *Held*, that, even if the negotiations were sufficient to constitute a contract, defendant could select his grantee, and could not be compelled to convey to plaintiff. — *Ellsworth v. Randall*, Iowa, 42 N. W. Rep. 629.

113. VENDOR AND VENDEE. —— One who contracts to convey a fee-simple title to land, clear of incumbrances, must convey a marketable title, and cannot declare the contract rescinded because of the vendee's refusal to accept a doubtful title.—*Hale v. Cravener*, Ill., 21 N. E. Rep. 534.

114. VENUE.—— Granting plaintiff a change of venue under Code Iowa, § 2590, was a matter of discretion, though there were no counter-affidavits, and the affiants for plaintiff were not brought into court and examined.—*Garrett v. Bickler*, Iowa, 42 N. W. Rep. 621.

115. VERDICT.——Where plaintiff sues on two causes of action, but produces no evidence to support the second, a general verdict for the gross amount sued for cannot be sustained. — *Kent v. Abeel*, Colo., 21 Pac. Rep. 714.

116. WATERS AND WATER-COURSES. —— The person entitled to the exclusive right to possess and use land abutting on a navigable lake or river is also, though he does not own the fee, entitled to enjoy the riparian rights incident to the land.—*Hanford v. St. Paul & D. R. Co.*, Minn., 21 N. W. Rep. 596.

117. WATER AND WATER-COURSES. —— A corporation which under its charter has the exclusive right to all the waters of a non navigable stream, and the exclusive privilege of using and controlling the same for mechanical, agricultural, mining, and city purposes, cannot allow such right to remain in abeyance for a long series of years, and thereafter assert the same to the exclusion of those who have, in the mean time, acquired rights to the use of such stream by actual appropriation and use, in pursuance of the general laws of the State.— *Platte Water Co. v. Northern Colorado Irrigation Co.*, Colo., 21 Pac. Rep. 711.

118. WATERS AND WATER-COURSES.—— In the case of a drain maintained across land by mere parol license of the owner of the land, he may revoke the license, and proceed to use his land as though the drain were not there without giving notice to the licensee.—*Wilson v. St. Paul M. & M. Ry. Co.*, Minn., 42 N. W. Rep. 600.

119. WATER AND WATER-COURSES. —— The rule that an owner of riparian lands has a right to have a stream flow through his lands in its natural state, without diminution of quantity or change of quality, is qualified by the limitation that each of such owners is entitled to a reasonable use of the water for domestic, agricultural, and manufacturing purposes.—*Ulbricht v. Eufaula Water Co.*, Ala., 6 South. Rep. 78.